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DAVID AND GOLIATH

RECENTLY, an insurance matter was handled for a national insurance company by an eminent firm which specializes in insurance law, with offices in the state capitol. ► Four lawyers represented various defendants — one of them from a downstate town. ► The odds would certainly appear to have been with the insurance firm, but the whole case was decided by the court in the very language of the brief of the young downstate lawyer, for all the court said was:

"In the brief of certain respondents there is cited a quotation from 29 AMERICAN JURISPRUDENCE, page 374, which is singularly applicable here, namely:" . . . then follows a long quotation, which is precisely in point on the case and is the rule adopted by the court.

Thus "David" won from "Goliath," but the question might be raised: WAS NOT THE MOST IMPORTANT PART OF THE BATTLE WON DECEMBER 2, 1936, when the lawyer subscribed to *AMERICAN JURISPRUDENCE* and thereby placed himself in a position to meet the specialists on their own ground and emerge with a decisive victory.

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ADMINISTRATION AND LAW—AN INTRODUCTION (LA)

Joseph A. Todd*

Although Professor Goodnow called attention more than 35 years ago to the problems for public law connected with the growth of administration as a specialized field of governmental activity, if he were alive today, he would quite probably be amazed at the mere number of administrative agencies, the scope of their authority, the volumes required each year to collate their rules and regulations, and the proportion of court dockets concerned with administrative matters.¹ He would be more astonished, however, to find that so little seems to have been accomplished in the solution of these problems. The fires of controversy still burn fiercely—and pretty nearly the same old logs grace the grate.

It was in 1905 that Professor Goodnow stated:

"The most striking if not the most important questions of public law and the first to demand solution are those to which the name 'constitutional' is applied. To their solution the wisdom and political activity of the past have been devoted. The present age, however, is devoting itself primarily to questions which are generally referred to as 'administrative.' A function of government called administration is being differentiated from the general sphere of governmental activity, and the term 'administrative law' is applied to the rules of law which regulate its discharge."²

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¹For survey of the extent of this development, see FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) c. 1; BLACHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934).

²Goodnow, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905) 1. HAINES AND DIMOCK, ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION (1935), a volume in honor of Professor Goodnow, is an excellent appraisal of his contributions.

Despite this clear statement of the challenge, his teachings at Columbia, and the similar teachings of Professor Maitland at Cambridge in the latter part of the last century,³ it was not until 1915 that one of England's most noted authorities came reluctantly to admit the existence in England of something vaguely resembling the French *droit administratif*, with which he had contrasted the English Rule of Law so sharply.⁴ We now know that English Administrative Law had its beginning at least as early as the 1830's with the factory laws and the unique relationships between the central and local governmental authorities during that period.⁵

The wisdom and necessity of administrative proceedings which involve adjudication of the rights of persons and property are still strongly challenged. Only recently the Lord Chief Justice of England, to quote the classic words of Justice Frankfurter, "left the bench, as it were, to break a lance for the pristine purity of Dicey's rule of law."⁶ Emanating, as it does, from the upper reaches of the English judiciary, and representing a most vigorous exercise, this expedition demands some attention. The inner workings of the departments are subjected to the judicial scrutiny; and the statutes and reports are searched with fruitful results. It cannot be said that his conclusions suffer from any lack of definiteness:

"Administrative 'law' in this country is not really a system at all, but is simply an exercise of arbitrary power in relation to certain matters which are specified or indicated by statute, not on any definite principle, but haphazard."⁷

"The citizen is delivered over to the department. The department becomes judge in its own cause. And the measure which produces these results is itself the handiwork of the department. More than that it is manifestly the off-spring of a well-thought-out plan, the object and the effect of which is to clothe the department with despotic powers."⁸

"The scheme is really ludicrous. One of the parties is absent; there is no hearing; the decision is given by the opposite party; and there is no appeal."⁹

³Maitland's lectures were published posthumously in 1908 as *THE CONSTITUTIONAL HISTORY OF ENGLAND*.

⁴Although admitting that a considerable amount of judicial and quasi-judicial authority had been given to English public servants, Dicey added, however, "but the fact that the ordinary law courts can deal with any actual and probable breach of the law committed by any servant of the crown still preserves the rule of law which is fatal to the existence of the true *droit administratif*." Dicey, *The Development of Administrative Law in England* (1915) 31 L. Q. REV. 148, also in 4 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1938) 7-12.

⁵CARR, *CONCERNING ENGLISH ADMINISTRATIVE LAW* (1941).

⁶Frankfurter, *Introduction* (1933) 18 *IOWA L. REV.* 129. This is a part of a Symposium on Administrative Law Based on Legal Writings, 1931-1933.

⁷HEWART, *THE NEW DESPOTISM* (1929) 46.

⁸*Id.* at 159.

⁹*Id.* at 162.

Nor does the position of the Lord Chief Justice lack support. The literature on both sides of the ocean has flourished, and it abounds in resounding phraseology. The phenomenon is described, along with "the new despotism," as "the hegemony of the executive,"¹⁰ "the headless fourth branch of the government,"¹¹ "the federal octopus,"¹² "bureaucracy triumphant,"¹³ "justice without law,"¹⁴ or merely "lawlessness."¹⁵

Justice Hewart had a fellow-traveler on the bench of our highest tribunal in the person of Chief Justice Hughes. There was, however, a significant difference. In England, because of the unbridled sovereignty of Parliament, Justice Hewart found it expedient to resign his office to seek his ends—and achieved only a Parliamentary Commission of Inquiry.¹⁶ As the leading member of what has been described as our perpetual constitutional convention, Justice Hughes remained on the bench and embedded his views in the law of the land.¹⁷ The success of the counter-attack pressed home by the Court against its administrative opponent is certainly one of the most remarkable judicial achievements of the age.

Quite early, upon the occasion of the *Ben Avon* case,¹⁸ it gave rise to this comment:

"Whatever one may think of this latest case, it throws light on one feature of our judicial history, the power of the Court to come back and take a hand in the decision of matters supposed to have been surrendered by them to the administrative. And it is interesting to see how carefully in its advance the Court retraces the very steps it took in its retreat."¹⁹

¹⁰Pound, *The Administration Application of Legal Standards* (1919) 44 A. B. A. REP. 445.

¹¹PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES (1936) 40.

¹²EDMUNDS, *THE FEDERAL OCTOPUS* (1932). The author leaves little to stimulate the reader's curiosity for further perusal by appending a sub-title, *A Survey of the Destruction of Constitutional Government and of Civil and Economic Liberty in the United States and the Rise of an All-Embracing Federal Bureaucratic Despotism*.

¹³ALLEN, *BUREAUCRACY TRIUMPHANT* (1931).

¹⁴Pound, *Justice According to Law* (1914) 14 COL. L. REV. 1, 21. The part of this article relevant to this discussion is reprinted under the title, *Executive Justice*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 63, 71.

¹⁵HEWART, *THE NEW DESPOTISM* (1929) c. 4.

¹⁶The Committee on Ministers' Powers, appointed the same week *The New Despotism* came off the press.

¹⁷See Haines, *The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 AM. POL. SCI. REV. 1.

¹⁸*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908 (1920).

¹⁹Isaacs, *Judicial Review of Administrative Findings* (1921) 30 YALE L. J. 781.

Few series of cases have received the attention given the decisions in *Crowell v. Benson*,²⁰ *St. Joseph Stockyards v. United States*,²¹ *Jones v. Securities and Exchange Commission*,²² and the *Morgan Cases*.²³ It appeared for a time after 1937 that the Court was relaxing its restriction upon the substantive powers of Congress to legislate and to delegate its authority by statute only to obstruct the accomplishment of statutory purpose by too-rigid control over the procedures of administration in specific cases. The second *Morgan* case has been contrasted with the decision which forced Dicey to his reluctant admission,²⁴ with the important difference that almost a quarter century earlier the English courts had accepted the procedure here declared insufficient.²⁵ The *Morgan* case laid down such a strict rule as to procedure and applied such a broad view of the doctrine of judicial review that serious concern was openly expressed.²⁶

There is some reason for believing that this trend is at an end, though this view may be too optimistic.²⁷ In January, 1940²⁸ the Court took due note of the important differences in origin and functions of courts and administrative tribunals, observing that such differences "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." Otherwise, concern was felt lest courts "stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine," and it was recognized that "interference by the courts is not conducive to the development of habits of responsibility in administrative agencies." Fortunately it is only necessary for the Court to return again to an interpretation of the separation of powers which prevailed for a century and to delete some of the additions and interpolations of the due process of law doctrine in order to reconcile administrative law and procedure with constitutional theories.²⁹

²⁰285 U. S. 22, 52 Sup. Ct. 275, 76 L. ed. 587 (1932).

²¹298 U. S. 38, 56 Sup. Ct. 720, 80 L. ed. 1033 (1936).

²²298 U. S. 1, 56 Sup. Ct. 654, 80 L. ed. 1015 (1936).

²³298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1288 (1936); 304 U. S. 1, 58 Sup. Ct. 773, 82 L. ed. 1129 (1938); Petition for rehearing denied in 304 U. S., 1, 23, 58 Sup. Ct. 999, 82 L. ed. 1129, 1135 (1938); 307 U. S. 183, 59 Sup. Ct. 795, 83 L. ed. 1211 (1939).

²⁴*Local Government Board v. Arlidge*, [1914] 1 K. B. 160.

²⁵HART, AN INTRODUCTION TO ADMINISTRATIVE LAW (1940) 308.

²⁶See the letters of the Secretary of Agriculture in the New York Times, May 8, 1938.

²⁷See *Cudahy* case, decided March 2, 1942. The court here was divided, 5 to 4, on a matter of procedure under the Fair Labor Standards Act, and the two opinions revealed sharp differences of opinion among the Justices as to the scope of administrative action.

²⁸*Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 60 Sup. Ct. 437, 84 L. ed. 656 (1940).

²⁹See Haines, *The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 POL. SCI. L. REV. 1.

In spite of all the warnings, indictments and protests, however, Dean Leon Green of Northwestern asks "in all seriousness, whether the lawyer, either as a professional man or citizen has any legitimate basis for hostility to the administrative process."³⁰ There are many other prominent members of the American Bar who have asked themselves that question. Those who have thought the matter through would certainly be inclined to agree with Judge John J. Parker, who faced the issue squarely:

"Under the conditions of modern life it is absolutely necessary that the state regulate economic life. Laissez-faire is gone. The conflict is not between laissez-faire and regulation, but between regulation and some form of state socialism. If socialism is to be avoided, the state must regulate economic life. The courts cannot furnish this regulation. The legislature cannot furnish it. It can only be furnished by these administrative agencies, combining, as they do, certain executive, judicial, and legislative functions."³¹

This statement is a truism, and like most truisms contains much unaccepted truth, despite its logic. (As soon as we admit that something other than good can come from complete freedom of action, regulation is inevitable.) This regulation must bring with it the administrative process. Not only is the judicial process unsuited to the task of such regulation, but if faced with the issue, judges do not desire to attempt it.³²

One of the gravest errors of those who dislike administrative adjudication is their belief that the multiplicity of administrative authorities and the scope of their authority springs from a despotic lust for power—a "well-thought-out" plan. Such a belief obscures the real forces in our political and social structure. Much of the criticism directed against the procedures and practices of regulatory bodies is but an outcry against the purposes of the regulation itself—a fuss about the stables, as it were, after the horse is gone. As one of our keenest students of public affairs puts it:

"We have been too concerned with being critical of the extension of governmental regulation to apply any fresh and fruitful thinking to the real problem of getting things done. . . . The new administration becomes an issue chiefly where the desirability or lack of desirability of the particular function to be administered is called into question."³³

³⁰An address delivered before the Mississippi Bar at Natchez, Sept. 5, 1935. Green, *The Administrative Process* (1935) 8 MISSISSIPPI LAW JOURNAL 54, 55, reprinted in (1935) 21 A. B. A. J. 708.

³¹Parker, *Improving the Administration of Justice* (1941) 27 A. B. A. J. 75.

³²See *Administrative Law Symposium II* (1941) 27 A. B. A. J. 207, 209-210.

³³Gaus, *The New Problem of Administration* (1924) 8 MINN. L. REV. 217, 218.

To say that the criticism is more properly directed to objectives than procedure and practice is, however, only a partial statement. A distrust of government is a factor of great significance. There would be much less opposition to regulation if there were fewer of those undesirable images which the vague term "bureaucracy" brings to our minds. Of the three proverbial major catastrophes—fire, flood, and officials—we have largely lost our fear of fire and flood, but cherish our antipathy for the official. The administrative process thus bears the burden of an attack arising from opposition to regulation and a general lack of confidence in government because it is the usual manifestation of unwelcome action. It is not differentiated, but identified with undesirable phenomena; not regarded as a solution of pressing problems, but as a harbinger of others. There is nothing in these statements, however, to explain or justify the growth of administrative adjudication. Dislike of regulation and fear of bureaucracy are deep-rooted characteristics of American political philosophy. Unless there are compelling reasons for administrative adjudication, they are sufficient cause for halting further expansion. Such other reasons are easily discovered, however. Indeed, they are painfully obvious.

The necessity and in fact the inevitability of governmental control over large areas of economic activity has been referred to. It has become commonplace that we must yield some freedom in order to preserve the remainder. The time and place for considering what regulation is desirable and expedient should also be the time and place for spelling out and settling the issue, aside from the appraisal of results after a sufficiently long period of operation. That such is not the actual result can be explained at least in part by the processes whereby the decision is reached.

It is a familiar complaint that party platforms and the speeches of candidates take as their paramount aim the avoidance of issues and the straddling of fences. In less measure, perhaps, is there a similar tendency in our legislatures. Compromise in objectives and looseness of statutory definitions are the deadliest enemies of just and efficient administration. All too often they result from the failure of parties and party leaders to define the issues and describe the objective toward which they desire administration to be directed. The fruits of defects in our democratic processes thus quite often are firmly fixed in the framework and substantive law of administrative agencies, who have slight chance of passing the buck further.

It would be a grievous error indeed to thus attribute faults to our legislative processes without noting the difficulties of the problems being

Discrimination
in government
by administrative
adjudication
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dealt with. We hear so much of "*expertise*" in all phases of modern life, and the connotations for governmental administration are so often associated with well-known examples of "inexpertness," that I have some hesitation to introduce the subject. It is so easy to say that modern problems of economic and social adjustment are "complex" and therefore require new techniques; and so difficult to make the analysis required to understand what significant truth there is in that statement. Only a part, perhaps only a small part, of the lack of adequate treatment of these problems is due to fundamental defects of political processes. The intricate and complex operations which pervade, and make progress possible in science, industry, and social institutions in an almost kaleidoscopic world demand the forging and sharpening of equally keen instruments and techniques of government. To meet these "human and technological imperatives,"³⁴ we are turning to administrative processes.³⁵

The judiciary, along with the legislative, must accept a share of such indictments as may be returned as true bills. Dean Pound, whose affection for the common law leaves little room for a love of the administrative process, tells us:

"In the nineteenth Century the United States developed a system of judicial interference with administration. Law paralyzing administration was an every day spectacle. Almost every important measure of police and administration encountered an injunction."³⁶

In not a few instances administrative control has been the direct outgrowth of the failure of judicial and legislative action to accomplish the desired ends. Thus, the Federal Trade Commission was created because the courts had failed to achieve the purpose of the Sherman Act.³⁷ The adjudication of workmen compensation claims has been taken out of

³⁴See GRIFFITH, *THE IMPASSE OF DEMOCRACY* (1939) cc. 2, 3.

³⁵"These administrative processes are the two prime methods of making the adjustments required by a complex and changing social order in which it is necessary to plan socially, to harmonize conflicting interests, to make a multitude of economic innovations, and to control a huge government machine which regulates and directs the activities of citizens in countless ways. The remarkable development of these processes during recent years is a testimony of their value in a crisis." BLACHLY AND OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* (1934) 18.

³⁶Pound, *Justice According to Law*, (1914) 14 COL. L. REV. 1, also in 4 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 63. Though he recognizes the necessity for a certain amount of "executive justice," it is a necessary "evil." At another place he declares: "The common law is perfectly adequate to deal with this matter." Pound, *Modern Administrative Law* (1939) 51 VA. STATE BAR ASS'N PROC. 388.

³⁷PRIFFNER, *PUBLIC ADMINISTRATION* (1935) 373 *et seq.*

the courts in most jurisdictions, despite the development there over the course of several centuries of the principles governing such cases.³⁸

Dean Landis has stated that "The administrative process is, in essence, our generation's answer to the inadequacies of the judicial and legislative processes."³⁹ It is in the context of such specific analysis that this statement takes on its full meaning. The illustrations can be much amplified and extended.

There are, then, urgent forces underlying the increased use of this "fourth branch of the government."⁴⁰ Account has been taken of the division of opinion as to its desirability. There is unanimity as to its importance for the future, however. Those who would block its growth only express that desire as a hope and sound a warning of impending doom; those others, like Robson, welcome the future, expressing the belief that "For a long time to come administrative tribunals will undoubtedly be the most effective method of securing the welfare of the nation in certain departments of life."⁴¹

May we not, therefore, accept this latter statement as the correct view, and seek to analyze the forces which have in the past made the operation of the administrative process difficult and which still seem to cast a shadow of disreputability over it?

The most recent comprehensive survey of Administrative Law in this country gives first importance in future developments to the problem of the relation of the new "executive justice" to our traditional "rule of law."⁴² The classical statement of this doctrine is found in Dicey's famous work, *The Law of the Constitution*.⁴³ In order better to illustrate the advantages of the English system under which all public officials were amenable to the ordinary law of the land, he set it in opposition to the Continental system, and especially the French *droit administratif*, which he described as the antithesis of any system of jurisprudence capable of

³⁸Parker, *Improving the Administration of Justice* (1941) 27 A. B. A. J. 75, 80. Gaus points out that this shift was due to obsolete methods and concepts applied by the courts rather than to a lack of dispatch in reaching decisions, as is commonly advanced. Gaus, *The New Problem of Administration* (1924) 8 MINN. L. REV. 217, 229.

³⁹LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) 46.

⁴⁰Recent attempts have been made to make certain that it does not remain "headless." Cf. The Walter-Logan Bill, which passed both Houses of Congress but was vetoed by the President in December, 1940; the previous Logan Bill (S. 915, 76th Cong.); and the Bills drafted by the Attorney General's Committee on Administrative Procedure (S. 674 and S. 675, 77 Cong.). These proposals were strongly supported by the American Bar Association. *Administrative Law Symposium* (1941) 27 A. B. A. J. 133.

⁴¹ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1928).

⁴²HART, *AN INTRODUCTION TO ADMINISTRATIVE LAW* (1940).

⁴³(8th ed. 1927) c. 4.

Handwritten notes in left margin:
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giving protection to its people from arbitrary action by public officials. However regrettable his misinterpretation of the French system, it at least served his purpose well—and nowhere better than in the formation of American constitutional government. Because the supremacy of law is the very foundation of American constitutional government, and because, following Dicey, the existence of this rule of law is regarded as a negation of administrative adjudication, we should ask if this should be so.

The Continental systems of administration are marked off from the Anglo-American by three general characteristics:⁴⁴ (1) The absence of jurisdiction of Civil Courts over the administrative and political acts of officials; (2) Centralization of administration; and (3) Local autonomy on the Continent. Of these, we are concerned primarily with the first. France has a separate system of courts headed by a supreme Council of State which has jurisdiction over all matters arising out of the acts of governmental officials. This system originated with the Constitution of 1800, provision being made for administrative appeals from subordinate to higher officials, "*appeals to the ordinary courts being considered inadmissible.*"⁴⁵ It is this statement which points the problem. Why was it that such a difference of opinion existed with respect to the ordinary courts in the two countries?

Undoubtedly a part of the explanation is to be found in the greater influence of the Roman civil law in France;⁴⁶ but there were other, more practical, reasons. It is essential to understand that the same ends were being sought in both countries—sufficient freedom of action to seek the objectives of the state according to the controlling philosophy of government at the time. In France, the courts were hostile. During the reign of Louis XVI and Turgot, the *parlements* had refused to register edicts and otherwise obstructed government.⁴⁷ In England, the courts were the creatures of the king, and stood with him frequently against the Parliament. Royal "stays" of acts of Parliament were accomplished with the cooperation of the courts long after the period when the reign of law is said to have been firmly established.

Ghose accounts for the differing views by noting the different courses taken by feudalism in the two countries;⁴⁸ while, according to Pound, the

⁴⁴GHOSE, COMPARATIVE ADMINISTRATIVE LAW (1919) 95-100.

⁴⁵*Id.* at 98. See *infra* p. 296 for a modern view of the distinction.

⁴⁶Its influence upon English law, even in the face of a developing common law, was much greater than usually supposed. See McILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN (1940) c. 4.

⁴⁷GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893) 217-224.

⁴⁸GHOSE, *op. cit. supra* note 44, at 98. "Had feudalism not followed different courses in England and on the Continent, there would not have been at this date in the civilized world two types of administrative law presenting almost diametrically opposed characteristics."

abrupt transfer of sovereignty achieved by the Revolution was largely responsible for the failure of the French to develop the sovereignty of law: the feudal king was unaccountable, and his agents and ministers were accountable to him, not to the law. After the French Revolution the people were sovereign and unaccountable to the law, and the public officials were accountable to the people, not to the law.⁴⁹ It should be emphasized that it was not thought that the public officials were unaccountable—but rather that their accountability was to the people, not to the ordinary courts.

One of the most important factors in weighing the acceptability of a doctrine should be an evaluation of the manner in which it has accomplished the purpose intended, or desired. Port calls our attention to the fact that the French administrative courts have been quite effective in protesting their citizens from official arbitrariness.⁵⁰ A leading American jurist⁵¹ is of the opinion that the English system offers less protection, instead of more, because of the nonsuability of the State, and the limitations placed upon positive judicial control over public officials,⁵² thus emphasizing the weakness of the crutch which Dicey fell back upon in his recantation.⁵³

Since 1872 a distinction has been made under the French system between "official" and "personal" acts, and the State has been held responsible for injuries arising out of torts and malfeasances due to acts of an "official" nature. Even this distinction has gradually broken down, however, and the State can now be sued in any event, unless the act was not related in any way to the service.⁵⁴

A noted French writer has compared the administrative courts with ordinary courts of justice in this fashion:

"In reality the system is for France satisfactory as a whole. It is not wise to submit to courts of justice litigations requiring knowledge of administrative law and the necessities of administrative life. This knowledge is not possessed by the judicial courts. They would be induced either to over-emphasize the prerogatives of the administration or to neglect them through

⁴⁹Pound, *Modern Administrative Law* (1939) 51 VA. STATE BAR PROC. 379.

⁵⁰PORT, *ADMINISTRATIVE LAW* (1929) c. 7.

⁵¹Borchard, *French Administrative Law* (1933) 18 IOWA L. REV. 133. This is a part of *A Symposium on Administrative Law Based Upon Legal Writings, 1931-1933*.

⁵²See Thrach, *The Inadequacies of the Rule of Law*, in *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* (1935).

⁵³Dicey, *The Development of Administrative Law in England* (1915) 31 L. Q. REV. 148, also in 4 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1938) 7.

⁵⁴See Duguit, *French Administrative Courts* (1914) 29 POL. SCI. Q. 385, and Garner, *French Administrative Law* (1924) 33 YALE L. J. 597. Both are penetrating analyses of the operations of the French system.

ignorance or partiality. The administrative judge knows administrative law. By virtue of his selection he can understand the facts and grasp them in their reality and complexity. His decision thus acquires the necessary authority to lead an administration, naturally tending to abuse its prerogatives, to yield to it."⁵⁵

Dickinson, who led the way in studying the relation of administrative adjudication to the supremacy of law, translated Dicey's statement of the rule into the present day concept of judicial review of administration action, saying "Administrative justice exists in defiance of the supremacy of the law only insofar as administrative adjudications are final and conclusive, and not subject to correction by a law court."⁵⁶ Such a broad interpretation of this doctrine ultimately comes to rest upon the proposition that the judiciary is the sole guardian of our fundamental rights, a position which has been expressly renounced. Justice Stone, in the *A.A.A.* case,⁵⁷ objected to an

"interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any of the three branches of government."

The Court has explicitly stated that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."⁵⁸ Mr. Justice Holmes, in an address before the Harvard Law School Association in 1923, assured his hearers that "The United States would not come to an end if we lost our power to declare an act of Congress void."⁵⁹ Nor, we may add, would administrative tribunals run amok if they were freed of judicial scrutiny.⁶⁰ This is by no means intended as a complete denial of the usefulness of judicial review, and the procedure outlined by Dean Pound, providing as it does for extensive

⁵⁵ROLLAND, *PRECIS DE DROIT ADMINISTRATIF* (1930) 213, quoted by Riesenfeld. *The French System of Administrative Justice* (1938) 18 B. U. L. REV. 48, 400, and 715, 740.

⁵⁶DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW* (1927) 38.

⁵⁷*United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1936).

⁵⁸*Missouri, Kansas, & Texas Ry. v. May*, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. ed. 971 (1904).

⁵⁹Pound, *Constitutional Aspects of American Administrative Law* (1923) 9 A. B. A. J. 409, 415.

⁶⁰The Attorney General compared the decisions of the federal administrative adjudicating agencies with those of lower federal courts on appeal to higher courts, concluding: "These tabulations disclose that the administrative agencies have a better record of affirmances than the lower Federal Courts in the special fields in which these agencies are particularly experienced. They also disclose that even in the more general legal fields not involving administrative orders the lower courts have a less favorable record of affirmances than either the administrative agencies, or the lower courts in cases involving administrative orders." Annual Report of Attorney General of the United States for the fiscal year ended June 30, 1930 at p. 47.

judicial review, would be a great improvement.⁶¹ Unfortunately, however, the mere extension of the jurisdiction of the ordinary courts to review actions of administrative bodies under the processes of usual issue has not thus far produced results which tend in the direction of a "modern, speedy, reasonable, inexpensive mode of review." It has tended, rather, to prolong litigation and to make it more expensive.

By the rule of law, every citizen has two rights, one being corollary to the other.⁶² First, he is entitled to have his rights adjudicated in a regular common law court; secondly, to question the legality of any act done by an administrative official in such a court. Why is it that we are so willing to look to the ordinary courts for just and reasonable treatment? That we do is unquestioned; somewhere in a judge (with or without a jury), lawyers, and a public proceeding we get justice as regards our private rights. About the same time that Baron Hewart was engaged in his study of the prevalence of lawlessness in England, a fellow Englishman was attempting to analyze the work of law and the courts to seek out their fundamentals, and thereafter to determine whether or not these fundamentals could be made to apply to administrative tribunals.⁶³ He concluded that the essential element is the "judicial mind," and he was of the opinion that it did, in fact, function in administrative tribunals.

Why, indeed, should not this be so? The Chief Justice of the Supreme Court of Michigan did not lose his sense of justice by virtue of his appointment as a member of the Interstate Commerce Commission. Moreover, it is certainly an error to assume that the path of law is a plain and certain one. The candor with which Justice Cardozo expressed himself on this point is always refreshing:

"I was much troubled in spirit, in my first years on the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass judges by."⁶⁴

Writers of text-books on Constitutional and Administrative Law take as a favored exercise the illustration of judicial vagaries in the applica-

⁶¹"A modern, speedy, reasonable, inexpensive mode of review, compelling these administrative agencies to have a record that can be reviewed and providing an easy, simple, inexpensive way of transmitting that record to a court and have a court pass upon it to see that the proceedings conform to the law of the land." Pound, *Modern Administrative Law* (1939) 51 VA. STATE BAR ASS'N PROC. 388.

⁶²This follows Dickinson's interpretation. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW* (1927) c. 2.

⁶³ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1928).

⁶⁴CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 166, 168.

tion of ruling principles. Hart⁶⁵ shows that judicial review varies, among other things, because of: (1) The type of governmental function involved, (2) the type of administrative action being reviewed, (3) the answer to the question whether the administrative authority whose action is being reviewed is one that by its character and procedure the courts regard as trustworthy, and (4) the form of action by which relief is sought in the courts. In this respect judicial review is similar to the results under the French system. The *Conseil d'Etat* likewise applies remedies in varying "doses" according to the claims made and the nature of the administrative action under review.⁶⁶

What may we conclude as to the relation of the rule of law to administrative adjudication? Reisenfeld insists that it is precisely the idea of the supremacy of law (in the sense of the legality and legitimacy of the administration) which motivates the French system, despite the accepted notion that it operates in contradiction to the traditional rule of law. Goodnow says that of the three elements in administration, the basic interest of all the members of the community and administrative efficiency usually stand in opposition to the third—the immediate private interest of individuals.⁶⁷ May we not, therefore, come to regard the rule of law as primarily designed to keep administrative authority in the service of the public interest rather than to protect private interests? The apparent contradiction would then be far less significant.

Although the effect of our war effort upon the rule of law is as yet almost entirely speculative, it cannot be left out of account. In the past the final judicial test of administrative action has usually come after the crisis has passed.⁶⁸ The Court, therefore, has been able to maintain that emergencies do not create powers and that the suspension of constitutional guarantees is a doctrine which "leads directly to anarchy or despotism."⁶⁹ It is unthinkable that there should be judicial obstruction of the national war effort, but the role which judicial review is to play for the duration will indeed be difficult to determine if the war proves as protracted as indicated at present. Controversies will have to be finally adjudicated by the Courts at a time when the effects of the decision upon administrative action will, of necessity, be the foremost consideration.

⁶⁵HART, AN INTRODUCTION TO ADMINISTRATIVE LAW (1940).

⁶⁶Riesenfeld, *The French System of Administrative Justice* (1938) 18 B. U. L. Rev. 715, 747.

⁶⁷GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905) 367-373.

⁶⁸See CORWIN, THE PRESIDENT, OFFICE AND POWERS (1940) c. 5.

⁶⁹*Ex parte* Milligan, 4 Wall. 2, 120, 18 L. ed. 281, 295 (U. S. 1886).

If judicial restraint is shelved for the duration, can it be reinstated subsequently? Although the Courts might prove equal to this task under conditions somewhat similar to those obtained in past years, there is a strong presumption that such conditions will not exist. The extension of centralized and direct administrative action proving necessary to convert our industries to war production will be no less necessary to return them to civilian production after the war has ended. How can the Courts bring under control these agencies whose policies and procedures have developed without judicial objection, although the matters have been presented for decision? The emergency may well be considered just as urgent then as now, so great may be the magnitude of the threatened economic collapse, if war controls are abandoned.

Today the responsibility for our continued existence as a free nation rests largely with the executive. It is not unlikely that before the struggle has ceased the responsibility for the continued existence of our civil liberties and economic rights will also be placed there. If our judicial and legislative processes prove incapable of playing any appreciable part in the determination of the issues of the future, we shall not be able to look with too much favor upon a period of our history in which we placed our reliance almost exclusively upon ordinary judicial processes as a safeguard of our constitutional form of government.

We have noted that the administrative process cannot be easily classified as judicial, legislative, or executive,⁷⁰ and as a result it has come into conflict with the doctrine which divides our government under these three rubrics. This doctrine of the separation of powers was not, however, intended to "divide the branches into water-tight compartments."⁷¹ It is helpful to keep in mind the fact that the doctrine itself resulted from inaccurate observations. English government was not organized in accordance with this principle when Montesquieu recorded his observations, nor has it been at any subsequent period.⁷² Speaking at Columbia University recently, Professor Carr said of the doctrine, "To the English it is a respectable ideal, not even a legal fiction; the multitude of exceptions disproves the rule."⁷³ The Committee on Ministers' Powers observed that "The doctrine of the separation of powers is not sacrosanct . . . it is merely a rule of political wisdom, and must give way where sound reasons of public policy require."

⁷⁰Reference to a statement of Judge Parker.

⁷¹Justice Holmes in *Springer v. Government of the Philippine Islands*, 277 U. S. 189, 211, 48 Sup. Ct. 480, 485, 72 L. ed. 845, 853 (1928).

⁷²Thus, it was the erroneous reporting of Montesquieu and Dicey that was to some degree responsible for setting two fundamental American principles of government against administrative adjudication.

⁷³CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW (1941) 18.

After an examination of the Continental and English backgrounds and exhaustive analysis of the records of our constitutional discussions, one student concludes: "The confusion out of which the principle of the separation of powers arose, warns us against a doctrinaire view of the subject."⁷⁴ Landis shows us that we have been viewing the doctrine much too narrowly:

"If the doctrine of the separation of powers implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of powers, it may in matter of fact be the means for the preservation of the content of that doctrine."⁷⁵

Indeed the limitations of the separation of powers are now more apparent than real. The extension of delegated authority with judicial approval is itself good evidence. There are at least three categories of cases in which the doctrine has yielded readily.⁷⁶ A legislature which is mindful of the rules of the game need have little fear that delegation of authority will be unduly disturbed, for the legislative patterns acceptable to the courts are becoming well-known. The tracing of these patterns and the description of the devices which have suffered the administrative process to function despite the doctrine is an intriguing pursuit, but it has limited interest for the immediate purpose. It seems far more helpful to subject current criticisms and habits of thought to analysis, with the hope that some psychological *impedimenta* will be thrust aside, leaving the true weaknesses to stand out the sharper for the clearing away of the underbrush.

To the criticism that administrative agencies make their own rules of procedure it is a legitimate reply to remind the critics that so do the legislatures and the courts. That the investigative technique adapts, or runs counter to, the older rules of judicial procedure should not be of great moment. It is rather to be expected.⁷⁷ Is there much cause for surprise that changes are thought necessary in the rules of evidence originally developed for the guidance of untrained jurymen? "Trial by fire" gave way but slowly to more rational proceedings, but it did give way. We may well concern ourselves that such modifications be improvements mak-

⁷⁴Sharp, *Some Representative Fathers, and the Separation of Powers*. (Unpublished thesis in Harvard Law School Library, 1927).

⁷⁵LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) 46.

⁷⁶(1) Delegation of power to fix conditions upon which a statute will take effect; (2) Matters of doubtful classification, capable of being either legislative or judicial, but completely neither, properly may be given to the administrative agency; (3) The application of standards laid down by Congress.

⁷⁷See comments on the *Pottsville* case, p. 290 *supra*.

ing for more just and efficient administration, but this cannot be done properly without criteria which give a large place to the objectives being sought. If it has become the public policy that under given conditions private rights must give way to the public welfare, it is indefensible to retain all those procedures which were designed to safeguard those rights inviolate. It is the rule rather than the exception under the administrative process to find private rights abridged in the public interest. We are prone to forget this fact in appraising the impact of administrative action.

When administrative tribunals are not charged with willful violation of equitable procedure, sometimes they are accused of ignorance of the legal concepts which, it is alleged, would so greatly improve their deliberations. In the light of the difficult circumstances under which they have often worked, and an admitted lack of trained personnel, we may plead them guilty; but properly ask whether the extent of their ignorance is any greater than that of lawyers concerning agencies and their special laws. There is an understandable reluctance among attorneys to spend the time required to acquaint themselves with such matters, but it should be obvious that any decision in which they may be interested is more likely to turn upon this issue than upon any other.

So great have been the problems arising out of the relation of administrative agencies to the courts that we seldom give thought to the effectiveness of other means of controlling unwise administrative action. We should not forget that administrative tribunals are the creatures of the legislature. The substantive law may be amended in any and all respects. Support funds may be withheld or curtailed. Investigations may be made as to the proper discharge of assigned duties, and, if it is deemed advisable, the agencies, human and statutory, may be abolished.

The executive, even in ordinary times, exercises important influence upon the character and operation of administrative agencies through his control over appointments and the preparation of the budget. Our system of political responsibilities also holds him accountable in some measure for a successful administration. Although the strength of this corrective measure is perhaps much less than it should be, it is, nevertheless, a considerable weapon over the administrative agency which seems to be getting out of line with public policy.

I should like to call attention to an even more important factor, however, or to indicate that the executive control is but one phase of a more significant directive toward more satisfactory administrative action. The level of administrative efficiency as a whole, with all those elements which compose complete action, determines to a very large degree the success of administrative adjudication. Every improvement in administrative management and techniques has its effect. "The surest road to administra-

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tive improvement is within the administration itself."⁷⁸ Those who oil the machinery and sand the tracks to the end that public business is more efficiently conducted contribute to the solution of the problems of administrative law.

This is a broad view of administrative law, but it must necessarily be so. We cannot get at the roots of the difficulties through such a narrow definition as "A body of precepts enforced by the agents of law, to require that the doings of these administrative agencies conform to the law."⁷⁹ Goodnow identified administrative law with the problems of governmental administration. Hewart, also, placing the topic in the current trend to classify law according to subject matter, states that the administrative law takes as its proper focus the field of public administration, and that it includes both the law *made* by the administrative authority and that which *controls* it.⁸⁰

The discussion thus far has proceeded as though the administrative process was an innovation of modern society. The truth of the matter is simply that its wide-spread use under the shadow of the traditional rule of law doctrine has forced its problems to the front. It has always been a vehicle of change, and is the source of much that we would be reluctant to yield. Dean Green has pointed out that the three great common law courts grew out of the King's Court, established to keep the King's peace and to protect his agents in the execution of his orders; and that the Court of Chancery, out of which we received our great system of equity jurisdiction, arose from appeals to the executive and was established under the prerogative power of the King.⁸¹

Many other illustrations might be drawn from the course of past events. McIlwain speaks of the "stupendous liberalization of Roman social institutions brought about by the generations of Roman jurists and magistrates," who acted under their *imperium*, and outside the formal and

⁷⁸Dimock, *Control Over Administration Action*, in *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* (1935) 321.

⁷⁹Pound, *Modern Administrative Law* (1939) 51 VA. STATE BAR ASS'N PROC. 382.

⁸⁰HEWART, *THE NEW DESPOTISM* (1929). His definition includes as law "all those regulations, orders, and decisions, whether of general or particular applicability, that have consequences in terms of a postulated legal order. By the term *administrative authority* is meant all those public officials and organs that are charged with the amplification, application, and execution of statutory law and the exercise of common law and Constitutional executive powers." It is, thus, a law of governmental action, including all that is not contained in the judicial and legislative Constitutional functions.

⁸¹"The point I wish to emphasize is that both the common law and the equity courts, as well as all other English Courts which were set up over a period of nearly eight centuries, together with their several systems of jurisprudence originated in purely administrative processes. From the direct delegation of the executive power they grew in organization and authority of their own, and through the processes which they developed have afforded the English citizen the protection of which he has always boasted." Green, *The Administrative Process* (1935) 8 MISSISSIPPI LAW JOURNAL 54, 57, reprinted in (1935) 21 A. B. A. J. 708.

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intricate procedures wherein the slightest slip would invalidate the action.⁸² In times of crisis it has ever been a favored device to those charged with responsibility. It remains for the future course of events to decide whether or not it can become more than a crucible of expediency. We do not lack for leadership. Justice Frankfurter, speaking of the powers of administrative agencies, declares:

"We are in the midst of a process, largely unconscious and certainly unscientific, of adjusting the exercise of these powers to the traditional system of Anglo-American law and courts. A systematic scrutiny of these issues and a conscious effort toward their wise solution are the concerns of administrative law."⁸³

As we noted elsewhere, Dean Landis looks upon the administrative process as "a striving to adapt governmental techniques . . . to a modern world, and at the same time, to preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American government."⁸⁴ The ideal of future administrative justice has been outlined as a "body of experts pursuing objective and scientific methods in dealing with the law and the facts with respect to a given set of civic relations"⁸⁵—and we would add "so organized and constituted as to be responsive to our democratic controls." However ineffective these controls may seem at times, we shall not render them more useful by ignoring their defects.

Professor Sayre asks that we attempt to "think together" Constitution, statutory and traditional law, looking forward to the future.

"After the strife for the development of Administrative Law in its initial stages is passed, there must come an end to this everlasting consciousness of contest between the Constitutional and private rights of governmental powers. There must come a time when Administrative Law is built so wholesomely and so strongly with its own techniques that it can stand on its own feet like the other divisions of law in this country."

Even failing the realization of such a complete rationalization of the place for administrative procedures in modern jurisprudence, time itself effects a wholesome result in specific instances. However stormy may have been the initial period of an administrative agency's life, respectability tends to cloak its later life. This force is well illustrated by the history of the Interstate Commerce Commission, the Federal Trade Commission, and public utility regulatory bodies. Seemingly, at some stage administrative tribunals come "of age" and we are willing to grant to them a measure of authority quite at odds with our theoretic doctrines.

⁸²McILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* (1940) 53.

⁸³Frankfurter, *The Task of Administrative Law* (1927) 75. U. OF PA. L. REV. 614, also in 4 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1938) 1.

⁸⁴LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) 1.

⁸⁵Haines, *The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 AM. POL. SCI. REV. 1, 19.

ADMINISTRATIVE JUSTICE AND JUDICIAL SELF-RESTRAINT (LA)

Vincent M. Barnett, Jr.*

The rapidly growing importance of the administrative process in democracy's struggle for survival, the state of flux in which public law in general finds itself today, and some recent decisions of the reconstituted Supreme Court of the United States, have all combined to loose a new flood of comment on the nature of the administrative function and the role of the judiciary in controlling it. This has been reflected in the divergent opinions within the Court itself, in scholarly and academic discussions and *symposia* to which this one adds its suggestions, and in the political struggle over the late unlamented Logan-Walter Bill. It would be unfruitful to discuss the narrow legal question of judicial review of administrative action in terms solely of an analytical comparison of cases and an exhaustive investigation of precedents upon the basis of which the Supreme Court is theoretically supposed to proceed in the immediate future. It would be useless to examine this question in such a way as to ignore the fact that since the spring of 1937 we have undergone what may aptly be called a "Supreme Court Revolution."¹ In order to understand the factors entering into any probable future solution of the paradox inherent in the relationship between judicial supremacy and the growing need for an administrative *expertise*, one must take account of the changes in personnel on the bench, of their known views on this matter, and of the relationship of the administrative law decisions to the general trends within the Court. One of those trends is toward the assertion of a renewed judicial self-restraint in dealing with the acts of the other agencies of government.² The evolving attitude toward administrative justice is a part of the same picture. Of course the changes are being made, where possible, without serious fracture of precedent. Analytical discussion of cases on the basis of established precedents is not without considerable value. But it is misleading if conducted *in vacuo*, if undertaken without the recognition that the primary factor in present-day trends with regard to judicial control of administrative justice is not what past cases have de-

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¹For a popular discussion of this change, see Davis, *Revolution in the Supreme Court* (1940) 166 ATL. MONTHLY 85. See also Barnett, *The Political Philosophy of the New Supreme Court* (1941) JOURNAL OF SOCIAL PHILOSOPHY.

²Barnett, *Constitutional Interpretation and Judicial Self-Restraint* (1940) 39 MICH. L. REV. 213. This article is in a sense complementary to the present one.

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cided, but what the attitude of the present Supreme Court is concerning the judicial function in general and its relation to administrative justice in particular. In the course of the following discussion an attempt will be made to consider briefly some historical aspects of the substantive due process concept relative to administrative action, to sketch the growth of the judicial monopoly of "reasonableness" in this sphere, to comment upon the current controversy outside the Court, and to examine the recent trend toward judicial self-restraint in the decisions of the new Supreme Court. Since much of the modern law of judicial review of administrative findings has evolved from the concept of due process of law, it will be pertinent to make some observations first on this phase of the subject.

DUE PROCESS AND ADMINISTRATIVE JUSTICE: SOME PERSPECTIVE

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The makers of early constitutions thought of due process primarily as a procedural limitation and not as a general substantive restriction on legislative or administrative action.³ Hence, prior to the adoption of the Fourteenth Amendment, due process was of little significance in American constitutional law. "On the whole," says one outstanding authority, "the interpretation of the phrase 'due process of law' or 'the law of the land' prior to 1870 had placed on legislatures few restrictions which were not merely procedural in character, and had merely suggested ideas or principles which under a different environment were soon to be received favorably."⁴ There had, of course, been a due process clause in the Fifth Amendment of the Constitution since the first term of the Supreme Court in 1790. But the federal courts had seldom been called upon to invoke it in protection of either personal liberty or property rights. The infrequent attempts resulted in failure.⁵ When the Fourteenth Amendment was adopted in 1868 it contained a similar due process clause, as well as the equal protection clause and the privileges and immunities clause. Historians have not yet agreed precisely what was meant by this amendment. Its formulation and ultimate adoption was strictly a party enterprise, due to Republican distrust of the states regarding possible treatment of the newly-emancipated negroes.⁶ By counting ratifications of the reconstruct-

³HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930) 105.

⁴*Id.* at 144. Judge Charles M. Hough said: "That all men of that day had no conception of due process, other than a summary description of a fairly tried action at law, is not asserted, but I do submit that reports before the Civil War yield small evidence that there was any professional conviction that it was more than that." Hough, *Due Process of Law—Today* (1919) 32 HARV. L. REV. 218, 222. Cf. Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court* (1913) 13 COL. L. REV. 37, 44 *et seq.*

⁵See, for example, *Den. ex dem. Murray v. Hoboken Land and Improvement Co.*, 18 How. 272, 15 L. ed. 372 (U. S. 1855).

⁶Hough, *supra* note 4, at 220.

ed states, which had been put under forcible Republican control, the amendment was declared adopted without any clear understanding as to its probable or even intended scope and effect. Later certain groups anxious to secure the protection of corporate and business interests under the Fourteenth Amendment were to maintain that the provision had been written in such broad language with that contingency specifically in mind. This was urged by Roscoe Conkling in his argument before the Supreme Court in the *San Mateo* case in 1882,⁷ by which time the clause was in the process of being broadened to include such protection. There is space here to say only that this so-called "conspiracy theory" of the Fourteenth Amendment—i.e., that one of the ulterior motives of the Congressional committee which drafted the apparently straightforward negro amendment was to provide this broad substantive protection to corporate interests as against state action—has been perhaps too readily accepted by many historians. Recent researches cast a good deal of doubt on Conkling's claim, which was supported in the *San Mateo* case argument by misquotation and misstatement.⁸ In any event, the meaning and scope of the amendment were not clear, and its effects were left to be worked out by the Supreme Court.

In the first litigation interpreting the Fourteenth Amendment, the majority of the Supreme Court speaking through Justice Miller in the *Slaughterhouse Cases*⁹ rejected claims for a broad interpretation of the provision, and ruled that it must be interpreted in terms of the "pervading spirit" of the amendment. Said Justice Miller:

"On the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."¹⁰

The broader view contended for by counsel, thought the Court, "would constitute this court a perpetual censor" over the legislative activities of the states.¹¹ Miller then made his famous wrong prediction when

⁷*San Mateo County v. Southern Pacific R. R.*, 116 U. S. 138, 6 Sup. Ct. 317, 29 L. ed. 589 (1882).

⁸See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890 (1939) 187 *et seq.* Also Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (1938) 47 YALE L. J. 37, 48. Compare McLaughlin, *The Court, the Corporation, and Conkling* (1940) 46 AM. HIST. REV. 45.

⁹16 Wall. 36, 21 L. ed. 394 (U. S. 1873).

¹⁰*Id.* at 71, 21 L. ed. at 407.

¹¹*Id.* at 78, 21 L. ed. at 409.

he said, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."¹² The first step in the ultimate denial of this position was Justice Field's long and vigorous dissent, one of many which finally resulted in the reversal of the Court's attitude on the Fourteenth Amendment. Chief Justice Chase and Justices Swayne and Bradley concurred in the dissent, which was heavily interlarded with natural law doctrines, references to "sacred and imprescriptable rights of man," and quotations from Adam Smith. For Justice Field, apparently constitutional requirements were secondary and his view of the nature of free society was really determinative of his position.¹³ Commenting on the minority view, Miller's biographer says, "In short, any governmental action must fall if a bench of judges thought it unequal, unjust, or partial. Miller and his colleagues of the majority felt called to no such pontifical function."¹⁴

The majority continued to apply this view over the dissents of Field and his colleagues.¹⁵ By 1885 there had been a total of only 35 cases in sixteen years since the provision was first before the Court. Since a good many of these were insignificant, it looked as though the Fourteenth Amendment and its due process clause had had small effect on the general powers of the states as they existed before its adoption. Until 1883, says Judge Hough, "appeals to due process of law in the federal courts were rare, and (barring the negro cases) never successful, except on the procedural side."¹⁶ In the meantime, the persistence of the groups who were contending for the broad interpretation of the clause caused Justice Miller to remark that:

"... there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful

¹²*Id.* at 81, 21 L. ed. at 410.

¹³*Id.* at 98, 21 L. ed. at 415. See SWISHER, STEPHEN J. FIELD (1930) esp. c. 16.

¹⁴FAIRMAN, *op. cit. supra* note 8, at 182.

¹⁵*Bartemyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929 (U. S. 1873); *The Granger Cases*: [*Chicago B. & Q. R. R. v. Iowa*, 94 U. S. 155, 24 L. ed. 95 (1877); *Peik v. Chicago & North-Western Ry.*, 94 U. S. 164, 24 L. ed. 97 (1877); *Chicago, M. & St. Paul R. R. v. Ackley*, 94 U. S. 179, 24 L. ed. 99 (1877); *Winona & St. Peter R. R. v. Blake*, 94 U. S. 180, 24 L. ed. 99 (1877)]; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1877); *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616 (1878); *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812 (1883); *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. ed. 173 (1884); *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636 (1885); *Dow v. Beidleman*, 125 U. S. 680, 8 Sup. Ct. 1028, 32 L. ed. 841 (1888).

¹⁶Hough, *supra* note 4, at 218.

litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.”¹⁷

Although this is a fairly accurate description of what the due process clause did in fact become at a later date, Miller leaves no doubt of its primarily procedural significance in 1878 when he remarks that if the laws

“ . . . provide for a mode of confirming or contesting the charge . . . imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.”¹⁸

Of the same general significance are the famous *Granger Cases*,¹⁹ in which Chief Justice Waite dismissed the due process contention by saying that for protection against abuses by the legislature in the exercise of power it is acknowledged to possess, “the people must resort to the polls, not to the courts.”²⁰

The “strange misconception” concerning due process persisted, however, in the arguments of counsel and the opinions of dissenting justices. And gradually economic and political pressure brought about a change in the decisions and a far-reaching reversal of attitude toward the implications of the amendment with respect to the substance of state legislative and administrative action. Conservative political considerations, which were being sanctioned in state judicial decisions, gradually transformed the minority view into the opinion of the Court.²¹ Counsel had not ceased to urge the broader view—based on something approaching a natural law hypothesis—despite the continued rejection of it and despite the surprise expressed by the Court that they should do so. These considerations were pressed on behalf of interests seeking the protection of a broad due process clause embodying classical *laissez-faire* principles against the regulatory attempts of “radical” legislatures. Consistent as they were with the political and economic theory of the late nineteenth century, they ultimately found recognition in the Court, although this meant a vital change in

¹⁷*Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. ed. 616, 619 (1878).

¹⁸*Id.* at 105, 24 L. ed. at 620.

¹⁹*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1887); and the so-called *Granger Cases*, 94 U. S. 155, 164, 179, 180, 24 L. ed. 94, 97, 99 (1877).

²⁰*Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87 (1887).

²¹This change can be seen in the successive modifications of the *Munn v. Illinois* position in *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 354, 4 Sup. Ct. 48, 28 L. ed. 173, 176 (1884); *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, 331, 6 Sup. Ct. 334, 29 L. ed. 636, 644 (1885); *Dow v. Beidleman*, 125 U. S. 680, 8 Sup. Ct. 1028, 32 L. ed. 841 (1888).

constitutional interpretation.²² By 1886, in the *Santa Clara Case*,²³ the Court had expressly recognized a corporation as a "person" within the meaning of the Fourteenth Amendment. And by 1890, in the *Minnesota Rate Case*,²⁴ the Court had definitely accepted the Field contention regarding the due process clause as a broad limitation on state regulatory power subjecting such legislative or administrative activity to extensive judicial control. In 1898, in *Smyth v. Ames*,²⁵ came the climax in this change in the conception of due process and the beginning of the modern body of law on the reasonableness of rate regulation under the due process clause. Judicial review thus entered a broad new field in placing restrictions on the regulation of public utilities and corporate enterprise by the states. Said Charles Grove Haines:

"Such review manifestly was not inherent in any constitutional provision or a necessary concomitant of constitutional interpretation as first understood and applied in state and federal governments. It came as a result of the fear of democratic control and of popular participation in the regulation of public utilities and of the belief that private property could be made safe only with extensive limitations on legislatures rendered effective by courts through judicial review of legislative and administrative findings."²⁶

With regard to review by the Supreme Court of the decisions of federal administrative agencies, a somewhat more complicated picture is presented. Such review could take the form of controlling administrative decisions through the interpretation of the statutes upon which the administrative power was based. It could take the form of requiring compliance with the judicial concept of procedural due process. Or it could take the form of overriding administrative action under the principle of "separation of powers" thought to be included in the granting of "judicial power" to the courts by Article III and the implicit denying of it to the other branches of the government. Beginning significantly with the Interstate Commerce Commission decisions after the establishment of that tribunal in 1887, the first two types of judicial control were rapidly asserted.²⁷ The third developed into the concept that administrative "quasi-judicial" findings of fact were subject to court review, both as to the

²²For a good brief discussion of the economic changes in the post-Civil War period and their effects on politics, see BUCK, *THE GRANGER MOVEMENT* (1913) 13 *et seq.*

²³*Santa Clara County v. Southern Pac. R. R.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. ed. 118 (1886).

²⁴*Chicago, M. & St. Paul R. R. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970 (1890).

²⁵169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819 (1898).

²⁶HAINES, *op. cit. supra* note 3, at 159.

²⁷McFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1913).

procedure by which such facts were found, and as to the substance of the finding itself. This independent review of the substance of the finding was thought to inhere in the "judicial function" and was said also to be an essential part of the due process clause of the Fifth Amendment. Nevertheless, after the first difficulties of the Interstate Commerce Commission in the courts, there arose in general a tendency on the part of the Supreme Court to uphold the actions of federal administrative agencies challenged under the due process clause.²⁸ Starting about 1920, however, there appeared in the Court an attitude less sympathetic toward the findings of administrative tribunals, both federal and state. This may be due to the tremendous increase in such agencies as a result of the war, and the hue and cry raised about the "new depotism" and "bureaucracy triumphant." Whatever the cause, the decisions in the next two decades elevated the issue of the extent of national judicial control over administrative findings, both federal and state, to a position of fundamental importance in our rapidly developing public law.

ADMINISTRATIVE FINALITY AND THE JUDICIAL MONOPOLY OF
"REASONABLENESS"

The question of the relationship between the courts and the administrative agencies revolves chiefly around two problems: First, the degree of finality to be accorded the administrative agency's finding of fact; second, the developing of procedural methods which give assurance that matters will receive fair consideration and that the administrative process will not be arbitrary. According to some students of administrative law, the second is supplanting the first as the most important area of developing principles today.²⁹ The contention is that more and more the question of fact-finding is being left to the administrative agencies, subject only to the requirement that the process by which those facts are ascertained be a fair, impartial and unbiased one according to judicial standards. It is indeed true that the tendency seems to be in this direction today. But court decisions and public discussions are keeping alive the whole question of judicial review of fact-finding in *de novo* proceedings. It has been said that the doctrine of judicial review of administrative decisions represents our American compromise between the necessity of getting things done and a distrust of government.³⁰ Up until 1937 or 1938 there was little evidence that that distrust was disappearing as regards administrative tribunals, even in cases having to do with the finality of findings of fact.

²⁸To this generalization, the experience of the Federal Trade Commission must be noted as an exception. See MCFARLAND, *op. cit. supra* note 27; also DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) c. 8.

²⁹See Gellhorn, *Introduction to the Symposium on Procedural Administrative Law* (1940) 25 IOWA L. REV. 423.

³⁰Feller, *Administrative Justice* (1938) 27 SURVEY GRAPHIC 494, 496.

In general, there are three possible ways to treat administrative findings of fact when reviewed by the courts. The first is to hold that findings are conclusive and binding; the second is to hold that findings are conclusive if supported by "substantial evidence"; the third is to hold such findings subject to independent determination by the court. This last is the center of bitter controversy, and has been so especially since the leading case of *Ohio Valley Water Co. v. Ben Avon Borough*.³¹ The usual rule has been that findings of fact, if supported by substantial evidence, are conclusive. (But when the question of confiscation or "constitutional fact" is raised, the party raising it is said to be entitled to a court's independent determination of both law and facts.) This is essentially the doctrine of the *Ben Avon* case, as followed and elaborated in *Crowell v. Benson*,³² and *St. Joseph Stockyards Co. v. U. S.*³³

The *Ben Avon* case involved a rate order of the Pennsylvania Public Service Commission setting maximum rates to be charged by the company. The company claimed an error in the valuation of its plants and appealed under the statute to the superior court, which passed on the weight of the evidence and ruled that there had been undervaluation. The Pennsylvania Supreme Court reversed the superior court, holding that there was competent evidence to support the commission's finding and that such finding was, therefore, under the terms of the statute, conclusive and final. The Supreme Court of the United States then reversed the Pennsylvania Supreme Court on the ground that, as interpreted, the statute prohibited an independent determination by the court, to which the company was held to be entitled by the due process clause. The reasoning, in brief, seemed to be that rate-making was a legislative function, and that a legislature cannot be the judge of its own power; therefore, since confiscatory rates would be unconstitutional, the constitutional issue depends on the question of valuation. Hence there must be an independent determination of facts—i.e., valuation—by a court. The majority remarked, "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and

³¹253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908 (1920). Some of the most interesting of the many comments on this decision are the following: Freund, *The Right to a Judicial Review in Rate Controversies* (1921) 27 W. VA. L. Q. 207; Green, *The Ohio Valley Water Case* (1921) 4 ILL. L. Q. 44; Isaacs, *Judicial Review of Administrative Findings* (1921) 30 YALE L. J. 781; Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577; Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 HARV. L. REV. 127; Wiel, *Administrative Finality* (1925) 38 HARV. L. REV. 447. See the discussion in (1939) 25 A. B. A. J. 453, 543, 770, 838, 940, 1018.

³²285 U. S. 22, 52 Sup. Ct. 285, 76 L. ed. 598 (1932).

³³298 U. S. 22, 56 Sup. Ct. 720, 80 L. ed. 1033 (1936).

facts. . . ."³⁴ Justice Brandeis dissented from this reasoning, with Justices Holmes and Clarke concurring. He insisted that the sole function of the state court was not to pass on the weight of evidence, but to decide whether there was "substantial evidence" to support the commission's findings.³⁵

Many thought that the *Ben Avon* opinion was an extreme statement of the doctrine of judicial supremacy with regard to administrative findings of fact, and hoped to see it narrowed by subsequent decisions.³⁶ But it was cited and followed without discussion in many cases.³⁷ And then came two decisions which gave a rude jolt to the hopes of those who awaited the narrowing of the doctrine. The first was *Crowell v. Benson*,³⁸ in which the same approach was followed with regard to federal administrative agencies. Here the Supreme Court, in reviewing an award by federal deputy commissioners administering the Longshoremen's and Harbor Workers' Compensation Act, held that the federal courts must give a trial *de novo* and judicially redetermine the jurisdictional fact of employment if the constitutional issue is raised. Under this conception of due process, the Court must redetermine in a separate proceeding whether or not the finding of fact of the administrative agency was correct. Despite the broad language in the *Ben Avon* case and the *Crowell* case, however, the Court has not applied the doctrine of trial *de novo* where the "constitutional fact" of confiscation is raised to all types of cases.³⁹ John

³⁴*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289, 40 Sup. Ct. 527, 64 L. ed. 908, 914 (1920).

³⁵*Id.* at 296, 64 L. ed. at 917. Brandeis continued to dissent in these cases. See his masterpiece in *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 56 Sup. Ct. 720, 80 L. ed. 1033 (1935).

³⁶Brown, *Functions of Courts and Commissions in Public Utility Rate Regulation* (1924) 38 HARV. L. REV. 141. Commented Brown: "The importance of the case is not confined to the field of public utility regulation, for the principles therein declared and the method of reasoning therein followed might easily be extended by a like-minded court to other fields of administrative action with portentous results." See also Beutel, *Valuation as a Requirement of Due Process of Law in Rate Cases* (1930) 43 HARV. L. REV. 1249, as well as articles cited *supra* note 31.

³⁷*Bluefield Waterworks and Improvement Co. v. Public Service Comm.*, 262 U. S. 679, 43 Sup. Ct. 675, 67 L. ed. 1176 (1923); *Ohio Utilities Co. v. Ohio Public Utilities Comm.*, 267 U. S. 359, 45 Sup. Ct. 259, 60 L. ed. 656 (1925); *Lehigh Valley R. R. v. Board of Public Utility Commissioners*, 278 U. S. 24, 49 Sup. Ct. 69, 73 L. ed. 161 (1928). The requirement of an independent judicial determination of facts in rate cases involving federal agencies was also accepted as included in the due process clause of the Fifth Amendment on the authority of the *Ben Avon* case. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 445, 43 Sup. Ct. 445, 67 L. ed. 731, 737 (1923); *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 486, 44 Sup. Ct. 169, 68 L. ed. 388, 401 (1924); *cf. Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 443, 50 Sup. Ct. 220, 226, 74 L. ed. 524, 536 (1930).

³⁸285 U. S. 22, 52 Sup. Ct. 285, 76 L. ed. 598 (1932).

³⁹In valuation for tax purposes, there is no right to an independent determination of facts. *Helvering v. Rankin*, 295 U. S. 123, 55 Sup. Ct. 732, 79 L. ed. 1339 (1935). In valuation by administrative body in eminent domain there is no such right. *Crane v. Halilo*, 258 U. S. 142, 42 Sup. Ct. 214, 66 L. ed. 514 (1922). In valuation for tariff

Dickinson notes the possible limitations of the *Crowell* decision and suggests the reasons as follows:

"It would be not merely inconvenient and burdensome to the courts, but altogether disruptive of administrative processes, to hold that every fact-issue on which a claim of constitutional right can be made to depend becomes thereby entitled to a retrial on new evidence in a review proceeding at law. The reason is that under the broad interpretation now placed on the Fifth and Fourteenth Amendments there is practically no issue going to the substantial merits of a controversy which if 'unreasonably' decided by an administrative tribunal cannot be made the basis of a claim of constitutional right."⁴⁰

Nevertheless, the doctrine was reaffirmed and even broadened in a leading case in 1935. This was *St. Joseph Stockyards Co. v. U. S.*,⁴¹ which involved a suit brought by the company to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for the company's services. The district court dismissed the complaint. The Packers and Stockyards Act of 1921 permits the Secretary of Agriculture to prescribe maximum charges for services of stockyards. In 1929 the Secretary prescribed a rate which was enjoined by the district court. The Secretary reopened the proceedings and hearings in 1933. The company appealed for further hearing but the Secretary denied the petition and set the rate in question in the instant case. The order was attacked as lacking the support of essential findings, and also as confiscatory and thus violative of the Fifth Amendment.

Chief Justice Hughes, for the Court, ruled that the facts adequately supported the order. He then proceeded to discuss the nature and extent of judicial review over administrative determination. Said the Chief Justice:

"When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process. . . . are met, as in according a fair hearing and acting upon evidence and not arbitrarily. . . . In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues

purposes there is no such right. *Hilton v. Merritt*, 110 U. S. 97, 3 Sup. Ct. 548, 28 L. ed. 83 (1884). See discussion of Brandeis' concurring opinion in the *St. Joseph* case, p. 315 *infra*.

⁴⁰Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055, 1077, reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 933, 1017.

⁴¹298 U. S. 38, 56 Sup. Ct. 720, 80 L. ed. 1033 (1935).

of fact lies with the legislative agency acting within its statutory authority."⁴²

But, he continued, the Constitution provides that property may not be taken without due process of law or for a public purpose without just compensation. Legislative acts are subject to judicial scrutiny in order to prevent the transgression of these limits of power. The legislature itself could not preclude such a review by any declaration of finality. There must be an independent judicial review upon the facts and law by courts, so that the Constitution, as the supreme law of the land, may be maintained. Thus, findings of fact by administrative bodies are usually final.

"But to say that their finding of fact may be made conclusive where constitutional rights of liberty and property are involved . . . and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."⁴³

It follows, therefore, the Chief Justice concluded, that since the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate findings of fact as to particular elements, even these subordinate findings may be examined and reversed, if the Court thinks they are plainly overborne by the evidence. In this case, however, the Court finds that the facts uphold the Secretary.

Justice Brandeis concurred in sustaining the Secretary's order, but he differed strongly as to the scope of review the Court should or could exercise. He challenged the recently developed conception of "constitutional fact" as requiring independent judicial determination of issues passed upon by administrative bodies. Said he:

"If in a judicial review of an order of the Secretary, his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved? Is there anything in the Constitution, which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?"⁴⁴

⁴²*Id.* at 51, 56 Sup. Ct. at 725, 80 L. ed. at 1041.

⁴³*St. Joseph Stockyards Co. v. U. S.*, 298 U. S. 38, 52, 56 Sup. Ct. 720, 726, 80 L. ed. 1033, 1041 (1935).

⁴⁴*Id.* at 73, 56 Sup. Ct. at 735, 80 L. ed. at 1052.

The safeguard which due process assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the fact shall be an impartial tribunal, that no finding shall be made except on notice and hearing, that the hearing shall be fair, and that it shall be conducted in such a manner that a court of law could determine whether proper procedure was observed. This is all the court should do. Given proper procedure and substantial evidence to support the findings of fact, the latter are final whether "constitutional facts" or not.

In this case, according to Justice Brandeis, the majority declared there must be an exception to the general rule of finality in cases of "constitutional fact," and that the court must in its independent judgment determine the correctness of the finding of fact made by the Secretary. The Justice then discusses many of the cases of review of administrative determinations, showing that in litigation involving the Board of Tax Appeals, Tariff Appraisers, and many others, finality of determination has been upheld even where confiscation is claimed. In answer to the majority position that the supremacy of law requires the court to exercise the same review as that exercised over statutes, Brandeis asserts that the supremacy of law requires only the investigation of (1) whether an erroneous rule of law was applied, and (2) whether the procedure was fair and regular.

Brandeis theory

"But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to a review by the court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict."⁴⁵

Such a broad review would be impracticable. Congress felt that this finality it attempted to confer on the Secretary was necessary for the enforcement of the act. To be effective, this legislation needed quick action. In the present case, it had been six and one-half years since the attempt to investigate the reasonableness of the rates in question was first begun. Moreover, the task of considering such facts carefully is too great for courts, which have neither the time nor the competence for the work. Justice Brandeis concludes that this doctrine of independent judicial review of "constitutional facts" would, if consistently applied, result in the emasculation of administrative rate-making bodies. Justices Stone and Cardozo concurred in the Brandeis opinion, intimating that their brother Brandeis is really stating the law as it should be, but unfortunately probably not as

⁴⁵St. Joseph Stockyards Co. v. U. S., 298 U. S. 38, 84, 56 Sup. Ct. 720, 740, 80 L. ed. 1033, 1058 (1935).

it is. Some recent tendencies in the Court, to be discussed later, seem to indicate that the Brandeis view may be on the way toward becoming the dominant view of the Court.

The *St. Joseph* case, taken with the *Ben Avon* case and with some of the reasoning at least in *Crowell v. Benson*, amounted to holding that once the constitutional point is raised, the courts will be bound to substitute their own judgment for that of the administrative body on all conclusions to be drawn from the evidence and on all subsidiary conclusions of fact as well. As it is almost always possible to raise the constitutional point, the result would be to make the courts sit to revise the findings in practically all rate-making cases. The Supreme Court has often said that this will not be done. It is similar to revising acts of the legislature. It is also similar, as Justice Brandeis pointed out, to having the court substitute its conclusions from the evidence for the jury's. There are at least two good arguments against this policy from the practical point of view. The first is that it destroys the effectiveness of administrative regulation by reducing the administrative agency to mere advisory status. The second is that it does this without any gain in security or increase in the certainty of general legal rules. Indeed, there is a loss in security due to greater confusion for a longer period of time. Because these are questions of particular facts in which the court substitutes its own inference for that of the administrative body, there is no resulting clarification of a general rule of law. If the courts are required to revise administrative findings on no more accurate grounds than their own inexperienced opinions as to the facts of particular cases, they have less time to develop general rules and principles of law—which is their proper task under a sound division of labor.

Policy U
Priority U
adm. division

Although much of the recent controversy over administrative justice has centered around the scope of judicial review of findings of fact, there have also been some interesting developments in the application of procedural requirements. Here as well, the Supreme Court in the past decade or so has shown a tendency to assume that judicial procedures are the only reasonable procedures and to impede the administrative process by reading very restrictive implications into the due process clause and narrowly interpreting statutory provisions. In *Jones v. S. E. C.*,⁴⁶ the majority overruled the commission's refusal to allow withdrawal of a registration statement concerning a new securities issue when misstatements and omissions were discovered in it. According to the statute, consent to withdrawal was to be given by the commission with regard to the public interest and the protection of investors. The majority, through Justice

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⁴⁶298 U. S. 1, 56 Sup. Ct. 654, 80 L. ed. 1015 (1935).

Sutherland, held that the commission was obliged to allow the company to withdraw the statement on the ground that there was no public right involved. The refusal "finds no support in right, principle or the law. It is wholly unreasonable and arbitrary."⁴⁷ Justice Cardozo, with Justices Brandeis and Stone, dissented. He stressed that the public does have an interest in punishing "recklessness and deceit" even after "notice of repentance." He commented on the strong language of the majority concerning the dangers of administrative action, in which Justice Sutherland had compared the possible results of incipient administrative arbitrariness to the famous English Star Chamber. Said Cardozo:

"A commission which is without coercive powers, which cannot arrest or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile."⁴⁸

The distrustful attitude of the majority toward administrative procedure was clearly revealed again in the *Morgan* cases, which reached the Supreme Court four times.⁴⁹ The first was in 1936, when the Supreme Court considered a restraining order against the enforcement of a rate set by the Secretary of Agriculture under the Packers and Stockyards Act. In sending the case back for further proceedings, the Chief Justice said the full hearing required by the statute "has obvious reference to the tradition of judicial proceedings."⁵⁰ The Secretary himself must therefore weigh the evidence before an order is issued, and this must appear in the record. After correction of the proceedings on this point, the district court for a second time dismissed the fifty bills of complaint involved, and again the case was appealed.⁵¹ This time the Supreme Court held the order invalid because the hearing was "fatally defective" in that there had been no tentative report or proposed finding on the basis of which the companies could prepare their side of the case before the administrative agency. In the first case, the Court had said that the preparation of a tentative report was "not essential." Now the case was sent back again on the ground that the absence of such a report made the hearing "fatally defective." Justice Black dissented. Upon the government's motion for a rehearing, the case came before the Court for the third time when, in a

⁴⁷*Id.* at 23, 56 Sup. Ct. at 660, 80 L. ed. at 1024.

⁴⁸*Id.* at 33, 56 Sup. Ct. at 665, 80 L. ed. at 1029.

⁴⁹Including a *per curiam* opinion denying a petition for rehearing.

⁵⁰*Morgan v. United States*, 298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1288 (1936).

⁵¹*Morgan v. United States*, 304 U. S. 1, 58 Sup. Ct. 773, 82 L. ed. 1129 (1938).

per curiam opinion with Justice Black dissenting, the motion was denied.⁵² In 1939 the same litigation came before the Court for the fourth time.⁵³ The Secretary had reopened proceedings under the Act and moved for the impounding of the funds pending the Secretary's final order. This motion was denied in the lower court, and on appeal the Supreme Court—recently affected by substantial changes in personnel—decided that the district court should retain the funds pending such final order. Justices McReynolds, Roberts and Butler dissented from Justice Stone's opinion, in the course of which the latter made some pointed remarks concerning the proper attitude of the courts toward the activities of administrative agencies. According to the man who has now become Chief Justice:

"In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if it must be, but never to be encouraged or aided by the other in the attainment of the common aim."⁵⁴

This is clearly a rebuke to the general judicial attitude toward administrative action exhibited in the past by the Supreme Court as well as other courts. The dissenting opinion in this case is interesting chiefly because of the basically different attitude toward administrative agencies in general which it reveals. As Professor James Hart has said, "The difference between the underlying assumptions of the two opinions is most illuminating."⁵⁵ In his comment on these cases, Professor Hart remarks that *Crowell v. Benson* and the *St. Joseph* case led to alarm lest judicial re-examination of findings of fact undermine the effectiveness of administrative adjudications. That alarm, he feels, has passed, "but too extensive judicial review is not as serious as holding quasi-judicial proceedings too closely to the judicial pattern. That were to cause them to bog down of their own weight."⁵⁶ The vital question, he feels, is how

⁵²*Id.* at 23, 58 Sup. Ct. at 999, 83 L. ed. at 1135.

⁵³*United States v. Morgan*, 307 U. S. 183, 59 Sup. Ct. 795, 83 L. ed. 1211 (1939).

⁵⁴*Id.* at 191, 59 Sup. Ct. at 799, 83 L. ed. at 1217.

⁵⁵HART, AN INTRODUCTION TO ADMINISTRATIVE LAW (1940) 307.

⁵⁶*Id.* at 308.

far the "judicialization" of administrative procedure is required under the due process clause. In *Edison v. N.L.R.B.*,⁵⁷ for example, the Court overruled a Board order on unfair labor practices on the ground that the hearing was improperly conducted. In the course of the opinion, the Court considered the provision of the statute that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" and that "the rules of evidence prevailing in courts of law and equity shall not be controlling." On this the Court commented that, while these provisions were undoubtedly meant to free the Board from technical rules, "this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."⁵⁸ In other words, what evidence has "rational probative force" is still for the courts to decide, although the rules of evidence prevailing in courts are expressly made not applicable to these determinations.

Thus has developed, in the phraseology of Professor Haines, a judicial monopoly of what is "reasonable" in the substantive as well as the procedural sense as applied to the attempts of administrative agencies to carry out regulatory functions.⁵⁹ What were reasonable inferences to be drawn from the evidence as well as what were reasonable procedures by which to secure the data were both in the last analysis to be determined by the courts. After a careful survey in 1930, Haines found it "apparent in the recent tendencies to limit and to circumscribe the activities of administrative tribunals that there is a lack of anything like legal or judicial self-restraint." Continuing, he said:

"The supervisory function exercised by the courts over administrative agencies is based upon concepts, principles, and standards which are often notoriously vague and are susceptible of a great variety of interpretations. It is assumed that judges are the only ones who know what is fairness and reasonableness in official action, and who appreciate what are the requirements of the operation of the rule of law. Judges may act upon vague standards and principles or upon mere general concepts of fair play in controlling administrative action, but administrators must be confined and controlled by definite and well-known standards prescribed in advance. . . . Of all public officers, judges are the only ones who are to be accorded the privilege of exercising an uncontrolled discretion."⁶⁰

⁵⁷305 U. S. 197, 59 Sup. Ct. 206, 83 L. ed. 126 (1938).

⁵⁸*Id.* at 230, 59 Sup. Ct. at 217, 83 L. ed. at 140.

⁵⁹Haines, *The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 AM. POL. SCI. REV. 1.

⁶⁰Haines, *supra* note 59, at 10.

This is an example of the reaction increasingly evoked by the maintenance of a judicial monopoly of reasonableness concerning administrative action in a society in which administrative action is becoming more and more the vital element of government. It leads us to a brief consideration of the current public controversy over administrative justice, after which it will be important to notice recent evidences of a changing Supreme Court view on this matter.

THE CURRENT CONTROVERSY OVER ADMINISTRATIVE JUSTICE - 321 325

As Dean Landis has said, the problems arising from the relationship of the administrative to the judicial branch break down upon analysis into three main issues: (1) the category of administrative acts that should be subject to review, (2) the manner for invoking that review, and (3) the scope of that review. Historical and traditional concepts of judicial power help to answer the first, while considerations of expediency play a large part in determining the second. As to the third, which is the real area of conflict in the current discussion, considerations which have reference to the relative expertness of the administrator and judge should govern the scope of the review.⁶¹ This is true with regard to both the procedural and the substantive aspects of the problem. Landis has consistently argued that the criterion as to the scope of review should be one of expertness. Lawyers and judges are experts in questions of law, but not in questions of fact. Even admitting that no clear-cut line of demarcation may exist, the criterion of expertness would still offer a guide to decision in such cases. Judges are experts in the "synthesis of design," and

"such difficulties as have arisen have come because courts cast aside that role to assume to themselves expertness in matters of industrial health, utility engineering, railroad management, even bread baking. The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts."⁶²

He would agree with Dickinson and most other commentators that the rule of law gives courts the power to pass upon the procedure of the administrative agency, even though the exercise of that power by some courts has tended to "judicialize" the administrative process and prevent the very informality and non-technical methods which the process was designed to secure.⁶³ The recent literature on judicial assurance of pro-

⁶¹Landis, *Crucial Issues in Administrative Law* (1940) 53 HARV. L. REV. 1077.

⁶²LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) 155. See his excellent discussion at 144 *et seq.*, the general theme being that "the administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes."

⁶³DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927). This is still a classic on judicial review of administrative action.

cedural requirements is interesting and enlightening in that it reveals the same split between those who feel that the administrative process should be given considerable freedom in working out its techniques and those who feel that the court, under the rule of law, must impose strict and litigious rules of procedure on administrative agencies.⁶⁴ But the chief controversy, as revealed by the provision in the Logan-Walter Bill requiring the courts to review questions of fact as well as questions of law, has centered around the nature of the division of labor which is to be established between administrative agencies and the courts. These discussions tend to turn upon the degree of conclusiveness which is to be allowed to the rulings of expert administrative agencies entrusted with a certain field of complicated regulatory problems. As Professor Arthur W. MacMahon has said,

"A subdivision of labor is called for in the tasks of the modern state. Administration affords this subdivision. Nor is the ideal less one of justice. There may be more substantial justice yielded by administrative processes which are reasonably quick, accomplished without undue expense, certain and not merely tentative, and guided by those who are acquainted with a particular world of facts, than may come from courts of general jurisdiction."⁶⁵

The defense of administrative justice, in short, is that it can create facilities which will supply the elements of reasonable caution and detachment without sacrificing the elements of energy, speed, cheapness, firmness, and specialization.⁶⁶ It is unfair, continues Professor MacMahon, to invite the reopening of issues in the courts, and especially unfair to permit the holding back of arguments and evidence by parties financially able to pay for appeals in the courts and probably helped by delay in any event. The system of administrative justice, he emphasises, is intended to keep the process cheap and accessible to the humble groups after all.⁶⁷ He notes:

"Judicial review of the substance of legislation is probably fading; but judicial review of administrative determinations and judicial prescriptions of administrative procedure are making headway. It is not too much to say that this tendency may in-

⁶⁴See Blachly and Oatman, *Federal Statutory and Administrative Orders* (1940) 25 IOWA L. REV. 619; Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 HARV. L. REV. 265; Griswold, *A Summary of the Regulations Problem* (1941) 54 HARV. L. REV. 401; Hankins, *Administrative Notice and Hearing* (1940) 25 IOWA L. REV. 479; Jaffe, *Investive and Investigation in Administrative Law* (1939) 52 HARV. L. REV. 1226. Also HART, *EXERCISE OF RULE-MAKING POWER* (1937), and BLACHLY AND OATMAN, *FEDERAL REGULATORY ACTION AND CONTROL* (1940).

⁶⁵MacMahon, *The Ordeal of Administrative Law* (1940) 25 IOWA L. REV. 435.

⁶⁶MacMahon, *supra* note 65, at 440.

⁶⁷MacMahon, *supra* note 65, at 445.

volve the ability of the government to act effectively. Unless it can act effectively, it cannot act at all."⁶⁸

John Dickinson, on the other hand, stresses the necessity for court review of law and facts on all issues where the constitutional issue has been raised. Supporting the general position of the majority in the *St. Joseph Stockyards* case relative to administrative finality, he comments:

"It seems clear that to permit a conclusion drawn from facts by an administrative agency to determine a constitutional issue where an alternative conclusion might have been drawn from the same evidence is in effect to permit the administrative agency to determine the constitutional question. To say that the courts in such a situation should have no choice but to accept the administrative determination without examining whether or not they can properly agree with it is to preclude them from determining issues which are issues of fact, as more and more constitutional issues are coming to be."⁶⁹

There is not space here to consider the various contributions to the discussion on both sides of this controversy. The issue, as viewed by many, is really no less than the entire future and effectiveness of regulation through the administrative process. Says Dean Landis:

"A delay of ten or fifteen years, an expenditure of millions of dollars, constant interruption of administrative proceedings by appeals to the courts, have brought the regulatory process into contempt. The practice of appealing to the Court on every issue of fact relating to valuation has transformed what should be a business-like proceeding into a bitter, wrangling lawyers' battle."⁷⁰

Others have stressed the need for administrative freedom of action.⁷¹ In attacking the supporters of the Logan-Walter Bill and the recommendations of the Committee on Administrative Law of the American Bar Association, Professor Haines has asked:

"Are we not being subjected to the recrudescence of the old and often discredited laissez-faire theory, with certain concessions to administrative agencies which will permit them to function in an ineffective and futile manner? The powers of administrative officers, boards, and commissions, it is maintained, are not to be reduced or interfered with; it is the procedure of such officers only which is to be reformed. But was it not the ad-

⁶⁸MacMahon, *supra* note 65, at 431.

⁶⁹Dickinson, *Judicial Review of Administrative Determinations, a Summary and Evaluation* (1941) 25 MINN. L. R. 588, 603.

⁷⁰Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519, 524.

⁷¹See Davis, *Judicial Emasculation of Administrative Action* (1941) 19 TEX. L. REV. 29; McGuire, *Judicial Review of Administrative Decisions* (1938) 26 GEO. L. J. 574; Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538.

vantages of direct, non-technical, and expeditious procedure that led to many of the grants of authority to administrative agencies and that justifies as a rule the present powers which they exercise? The real choice is between effective regulation by the present type of officers, boards, or commissions or impotent public agencies circumscribed by a rigid application of the separation of powers theory combined with the newly construed restrictions in accordance with a modernized version of due process of law."⁷²

Whatever the outcome of the current public controversy over the nature and extent of judicial control over administrative action, its significance cannot be overestimated. It is a reflection of new resistances to effective public control and an evidence of the skill and persistence of the leadership of the groups which, having lost the battle against public control in the political and legislative spheres, now seek to translate that resistance to the exalted sphere of natural rights judicially enforced. The recent campaign to sell the Logan-Walter Bill to the country was revealing in this respect. Its veto by the President was desirable not because present administrative procedures need no improvements but because an extension of judicial control of administrative findings and techniques is not the way to do it.⁷³ Some proponents of the bill were no doubt sincere in feeling that it would systematize administrative procedure. A good many of them, one is nevertheless inclined to think, supported the measure because it would serve to throw an additional barrier between public regulatory agencies and the interests to be regulated. On the whole, as Landis has emphasized again and again, the creation of these administrative agencies has been in response to the need for *expertise* both in policy-formation and fact-finding. To subject the latter again to independent judicial determination is to make pointless the fact-finding process itself. Against the possibility of arbitrariness, which all wish to prevent, the application of minimum if non-technical procedural requirements plus the continuation of the "substantial evidence" rule even moderately applied would be ample safeguards.⁷⁴ That the Supreme Court itself is exhibiting a tendency to adopt essentially this view seems fairly clearly indicated both in terms of some recent decisions and in terms of the known views of the personnel of the reconstructed Court. To a consideration of this tendency we now turn.

⁷²Haines, *Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 AM. POL. SCI. REV. 1, 21.

⁷³For a characterization of the Logan-Walter Bill as an attempt "to reform the entire system of administration, *en bloc*, by hasty and ill-digested generalizations," as well as an excellent discussion of the Acheson Report, see Jaffe, *The Report of the Attorney-General's Committee on Administrative Procedure* (1941) 8 U. OF CHI. L. REV. 401.

⁷⁴Landis, *Crucial Issues in Administrative Law* (1940) 53 HARV. L. REV. 1077, 1094.

THE NEW SUPREME COURT RECONSIDERS - *Safeguards* 8
procedural process

As a recent commentator has said, "In view of the constant disagreement among the justices themselves, it is difficult to make any generalization on the present state of the law as to the finality of administrative findings in constitutional questions."⁷⁵ The same must probably be said with regard to the entire question of the scope of judicial control over administrative activity, procedural as well as substantive. But if the cases do not justify an unequivocal conclusion as to the present state of the law or its direction, at least some recent decisions and the pronouncements of some of the men now on the Supreme Court indicate a reconsideration of that tribunal's position in the direction of greater judicial self-restraint in dealing with the activities of administrative agencies.

The most important litigation in this connection has been in the *Rowan and Nichols Company* cases.⁷⁶ There had been some recent previous decisions in which the tendency to restrict the scope of judicial review had been noted.⁷⁷ In the *Rowan and Nichols* cases the majority made explicit its general position with regard to this matter. There have been two cases, the first decided in 1940 and the second, on substantially the same issues, decided in 1941. Both involved orders of the Railroad Commission of Texas establishing proration quotas for oil production, allowing each well to produce a stated percentage of "hourly potential" capacity and treating marginal wells specially. The *Rowan and Nichols Oil Company* argued discrimination and confiscation. The district court enjoined the enforcement of the order, the circuit court affirmed, but the Supreme Court reversed the decree in both cases, each time with three justices dissenting. These cases are fully and ably discussed elsewhere

⁷⁵Rothman, *Administrative Law—Scope of Judicial Review* (1941) 39 MICH. L. REV. 438, 445.

⁷⁶Railroad Commission of Texas v. *Rowan and Nichols Co.*, 310 U. S. 573, 60 Sup. Ct. 1021, 84 L. ed. 1368 (1940); same, 311 U. S. 570, 61 Sup. Ct. 343, 85 L. ed. 358 (1941).

⁷⁷See *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 58 Sup. Ct. 483, 82 L. ed. 702 (1938), and comment on it in (1941) 39 MICH. L. REV. 438. Justice Stone, in *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 190, 58 Sup. Ct. 510, 516, 82 L. ed. 734, 741 (1938), said with regard to an administrative order forbidding trucks over a certain size and weight to use the state highways: "Since the adoption of one weight or width regulation, rather than another, is a legislative, not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. . . ." See also *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 146, 60 Sup. Ct. 437, 443, 84 L. ed. 656, 663 (1940), in which it was said that "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies." Other cases in which administrative action was upheld just prior to the *Rowan and Nichols* decision, in some of which the language is also significant, are *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 60 Sup. Ct. 693, 84 L. ed. 869 (1940); *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 60 Sup. Ct. 300, 84 L. ed. 347

in this symposium.⁷⁸ It is sufficient for the purposes of the present discussion to notice some of the language of the majority of the Court, speaking through Mr. Justice Frankfurter. Said the Justice in the first case:

"Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power. A controversy like this always calls for a fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."⁷⁹

"It is not for the federal courts," continued Frankfurter, "to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."⁸⁰ He felt that the lower courts in this case "appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order."⁸¹ Their conception might, indeed, have been better than that of the Commission. But whether a system of proration based on hourly potential is fairer than one based on some other factor or combination of factors "is in itself a question for administrative and not judicial judgment."⁸²

"Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering upon conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment."⁸³

Justice Roberts, with whom concurred the Chief Justice and Justice McReynolds, dissented. He said that although these were indeed tech-

(1940); *National Labor Relations Board v. Falk Corporation*, 308 U. S. 453, 60 Sup. Ct. 307, 84 L. ed. 396 (1940); *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206, 60 Sup. Ct. 493, 84 L. ed. 704 (1940). *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 60 Sup. Ct. 561, 84 L. ed. 738 (1940).

⁷⁸*Armstrong, Federal Courts and Administrative Action Under State Statutes; An Aspect of the Rowan & Nichols Cases*, p. 335 *infra*.

⁷⁹*Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 580, 60 Sup. Ct. 1021, 1024, 84 L. ed. 1368, 1373 (1940).

⁸⁰*Id.* at 584, 60 Sup. Ct. at 1025, 84 L. ed. 1374.

⁸¹*Id.* at 581, 60 Sup. Ct. at 1024, 84 L. ed. at 1373.

⁸²*Ibid.*

⁸³*Id.* at 581, 582, 60 Sup. Ct. at 1024, 84 L. ed. at 1373. "Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas Field. It has chosen to meet these problems through the day to day exertions of a body especially entrusted with the task because presumably competent to deal with it." *Id.* at 583, 60 Sup. Ct. at 1025, 84 L. ed. at 1374.

nical and difficult problems and the commission had been vested with broad discretion in solving them, "these facts could not justify the court's abdicating its jurisdiction to test the Commission's order."⁸⁴ This decision, he said, sets up principles concerning judicial review of administrative actions challenged under the due process clause "directly contrary to those which have been established."⁸⁵

The second *Royan and Nichols* case came up under a subsequent order of the Texas Commission, and involved similar issues.⁸⁶ Again the Supreme Court sustained the order. Frankfurter, speaking for the majority here also, added the following to what he had said in the first case:

"When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses."⁸⁷

Again the same three justices dissented. It is of more than passing interest to notice that already two of the three dissenters have left the Court.

Those who agree with Justice Roberts that the majority attitude represents judicial abdication contend that the nature of the Court's function requires it to do more than decide merely whether there was "substantial evidence" while refraining from considering the weight of that evidence or the reasonableness of the order drawn from it. They argue that where constitutional rights are involved, the courts must protect those rights—not merely enforce procedural requirements—because, they say, the Constitution requires them to do so. The real issue, of course, is *whether* the Constitution requires the judges to go beyond the preservation of procedural safeguards. And, although the decisions have always been somewhat confusing on this matter, it is probably safe to say that as interpreted since about 1890 the Constitution has required such judicial supervision. What is currently happening, however, is a rather fundamental re-evaluation of what the Constitution does require. The dissents of Holmes, Brandeis, Cardozo, Black and others on the required scope of judicial review of administrative activity bid fair to become the accepted view

⁸⁴*Id.* at 584, 60 Sup. Ct. at 1025, 84 L. ed. at 1374.

⁸⁵*Id.* at 585, 60 Sup. Ct. at 1026, 84 L. ed. at 1375.

⁸⁶Railroad Commission of Texas v. Rowan and Nichols Oil Co., 311 U. S. 570, 61 Sup. Ct. 343, 85 L. ed. 358 (1941).

⁸⁷*Id.* at 576, 61 Sup. Ct. at 346, 85 L. ed. at 362 (1941).

supplanting that of the old majority, just as in the 1880's and 1890's the persistent dissents of Field and his colleagues supplanted the more moderate views of Miller and Waite and vastly broadened judicial review. It can be claimed that a half-century of precedent is being severely modified. It cannot be claimed that the Constitution itself is being subverted or that the process of narrowing the scope of judicial review is any different from the process which broadened it. Field refused to accept as settled the twenty years' decisions by the Miller-Waite group declining to use the Fourteenth Amendment as the basis of extensive judicial review over state legislative and administrative activity in the regulatory field. The new majority apparently refuses to accept as settled the twenty years' decisions affirming the broad views laid down in the *Ben Avon* case. Field's dissent in *Munn v. Illinois* became law in the *Minnesota Rate Case*. Brandeis' dissent in the *Ben Avon* case has, to judge from the language of Justice Frankfurter, become law in the *Rowan and Nichols* case. This cannot be explained or even very well justified purely in terms of analytical constitutional principles. To be sure, the *Ben Avon* case has not been specifically overruled. But neither was *Munn v. Illinois*. This development is a part of the present constitutional change and growth which is not analytical and interstitial but is fundamental and far-reaching. It is the result of "judicial statesmanship" just as the establishment of judicial review in the Marshall period was, just as the tremendous broadening of judicial review in the transition period from the Civil War to 1890 was. The added emphasis on the peculiar competence of administrative agencies to fulfill tasks which the courts cannot expertly or expeditiously do, is of a piece with the general tendency toward judicial self-restraint exhibited also with regard to legislative acts of state and federal governments and the relationship of federal to state courts. The present Supreme Court is availing itself of our American constitutional tradition of judicial self-restraint in the continuous espousal of which the names of Taney, Waite, Miller, Holmes, Brandeis, Cardozo, and Stone have shown brightly.⁸⁸

There has, of course, been no very sharp reversal, either in terms of legal theory or in terms of practical result. Judicial review of administrative activity has always realistically been a question of degree rather than kind. The attempt to work out neat legal categories and strict principles has never succeeded in this field. As Dickinson said after an exhaustive study which sought to systematize American legal practice in this regard, "It is not a conclusion of pessimism or fatigue to say that, at least

⁸⁸If one is surprised to find Taney's name here, he should become familiar with recent re-evaluations of him. See especially FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* (1937), and SWISHER, *ROGER B. TANEY* (1935).

upon the surface of the cases, the field luxuriates in riotous uncertainty."⁸⁹ Practical factors have always been uppermost. The extent of review exercised depended on the subject matter of the particular case, on the particular agency involved, on the relative independence of that agency, on the relative ability of the courts and the administration to deal with the particular problem, perhaps even on the personnel of the agency involved.⁹⁰ Few judges have been so frank as Judge Hough when he remarked:

"When I have before me a case on review from the Interstate Commerce Commission, almost instinctively I want to sustain their order. When I have before me a case to review of the Federal Trade Commission, almost instinctively I want to reverse it."⁹¹

The Supreme Court can still, in the light of the *Rowan and Nichols* decisions, look at each case and decide the scope of review to be granted. It can deny the right of an independent judicial determination of fact except in rate cases where confiscation has been claimed. Independent judicial determination in this category of cases is still technically guaranteed. The holding in the *Rowan and Nichols* case—not a rate case—does not directly modify this although the assumptions and the language of the decision seem to point in that direction. As to other types of administrative activity, the scope of judicial review at the present time is flexible and uncertain.⁹² The really significant factor, therefore, is the change in attitude which will affect the degree to which the Court will exercise supervision over administrative action. For the issue has never been, and is not now, realistically whether the Court is to withdraw entirely from a scrutiny, on the record at least, of administrative findings of fact; nor is it on the other hand whether the Court must make an independent judicial determination in all cases in which the parties are able to devise a "constitutional issue." As to the former, the "substantial evidence" rule affords a safeguard against clearly arbitrary findings—and there is little evidence that the Court will abandon that criterion. As to the latter, the mere practical fact of the press of judicial business renders it impossible save as a theoretical position. The real question is, therefore, as it has always been, one of the degree of judicial control to be exercised over administrative findings. Granted that this will continue to differ with different agencies, and granted that the comparatively few cases exhibiting this trend so far constitute an infirm basis for prediction, it is submitted

⁸⁹DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 71.

⁹⁰See Rothman, *Administrative Law—Scope of Judicial Review* (1941) 39 MICH. L. REV. 438.

⁹¹Quoted by Frankfurter, *Summation of the Cincinnati Conference* (1938) 24 A. B. A. J. 282, 285.

⁹²"Courts are still groping for a workable theory which will determine the scope of judicial review in a particular case." Rothman, *supra* note 90, at 441.

that a glance at the known views of the members of the Supreme Court—a membership that is likely to remain substantially intact for some time to come—will suggest a growing moderation on the part of the Court with respect to the supervision of administrative activity.

Chief Justice Stone has already identified himself with the modern concept of judicial self-restraint. Indeed, the current general use of the term in constitutional discussions springs from his insistence in the classic A.A.A. dissent that the courts recognize that "the only check upon our own exercise of power is our own sense of self-restraint."⁹³ He remarked then that "Courts are not the only agency of government that must be assumed to have the capacity to govern," and pointed out the dangers in the "assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government."⁹⁴ His comments in one of the *Morgan* cases about the proper relationship between courts and administrative agencies as complementary agencies in the achievement of public ends will be recalled.⁹⁵ As Associate Justice, Stone served as the channel through which the ideals of Justice Holmes were kept alive on the Court. As Chief Justice he is likely to impart to the acts of the tribunal his own tempered moderation with regard to the extent of the judicial function.

Of the judges added to the Court since the reconstitution of that tribunal beginning in 1937, Justice Black has stated his views more clearly on this point than any of the others with the possible exception of Justice Frankfurter. He has flatly denied that the Fourteenth Amendment furnishes authority for the federal courts to indulge in judicial rate-making under notions of substantive due process. In an early case in which the company did not allege any procedural irregularities by the state commission, Black objected to any review at all by federal courts. Said he:

"For the first hundred years of this Nation's history, federal courts did not interfere with state legislation fixing maximum rates for public services performed within the respective states. The state legislatures, according to a custom which the Court declared had existed 'from time immemorial' decided what those maximum rates should be. This Court also said that 'for protection against abuses by legislatures the people must resort to the polls, not to the courts.' It was not until 1890 that a divided court finally repudiated its earlier constitutional interpretation and declared that due process of law requires judicial invalidation of legislative rates which the courts believe

⁹³United States v. Butler, 297 U. S. 1, 78, 56 Sup. Ct. 213, 325, 80 L. ed. 477, 495 (1936). See Barnett, *Constitutional Interpretation and Judicial Self-Restraint* (1940) 39 MICH. L. REV. 213.

⁹⁴*Id.* at 88, 56 Sup. Ct. at 329, 80 L. ed. at 500.

⁹⁵Discussed pp. 319 *supra*.

confiscatory. The dissenting Justices adhered to the long existing principle that regulation of public utilities was a 'legislative prerogative and not a judicial one'.⁹⁶

Black is here quoting Waite's opinion in *Munn v. Illinois* and stresses as his own view the position of the Court prior to the *Minnesota Rate Cases* in 1890. In another utility rate case he quoted an 1877 case⁹⁷ with approval to the effect that:

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."⁹⁸

With regard to federal agencies, he has also been emphatic with regard to limiting the scope of judicial review. In a dissent in *National Labor Relations Board v. Columbian Enameling and Stamping Co.*,⁹⁹ he remarked that the legislative requirement that "findings of the Board as to the facts, if supported by the evidence, shall be conclusive," should be considered as a real limitation of the power of the courts to review. It means, he said, that "courts should not—as here—substitute their appraisal of the evidence for that of the Board."¹⁰⁰ He emphasized that:

"The Labor Board, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, and many other administrative agencies were all created to deal with problems of regulation of ever increasing complexity in the economic fields of trade, finance, and industrial conflicts. Congress thus sought to utilize procedures more expeditious and administered by more specialized and experienced experts than courts had been able to afford. The decision here tends to nullify this Congressional effort."¹⁰¹

In other opinions, particularly in *National Labor Relations Board v. Waterman Steamship Corporation*¹⁰² and *National Labor Relations Board v. Bradford Dyeing Association*,¹⁰³ he elaborated his position that administrative findings of fact supported by evidence which permits, at most, conflicting inferences are conclusive upon review by the courts.¹⁰⁴

Of the other new judges, Justices Frankfurter, Douglas, and Jackson are on record as taking a similar general position regarding judicial

⁹⁶*McCart v. Indianapolis Water Co.*, 302 U. S. 419, 427, 58 Sup. Ct. 324, 328, 82 L. ed. 336, 342 (1937).

⁹⁷*Davidson v. New Orleans*, 96 U. S. 97, 105, 24 L. ed. 616, 620 (1878).

⁹⁸This was in *United Gas Co. v. Texas*, 303 U. S. 123, 58 Sup. Ct. 483, 82 L. ed. 702 (1938).

⁹⁹306 U. S. 292, 300, 59 Sup. Ct. 501, 83 L. ed. 660, 666 (1939).

¹⁰⁰*Id.* at 301, 59 Sup. Ct. at 505, 83 L. ed. at 666.

¹⁰¹*Ibid.*

¹⁰²309 U. S. 206, 60 Sup. Ct. 493, 84 L. ed. 704 (1940).

¹⁰³310 U. S. 318, 60 Sup. Ct. 918, 84 L. ed. 1226 (1940).

¹⁰⁴For a fuller discussion of Justice Black's opinions on this matter and his con-

review of administrative action. Since Frankfurter's view in the *Rowan and Nichols* cases is a good indication of his attitude, it will not be necessary here to reproduce his other comments on the question. Suffice it to say that they substantiate and confirm the inferences which can be drawn from his opinion in those cases¹⁰⁵ Douglas too has indicated his views in this connection. In a book of essays collected shortly before his appointment to the Court, he says, concerning the problems of regulation:

"Effective control calls not for the slower and heavier method of judicial decision but for the more subtle and more sensitive control of daily administrative action. This is not to say that studied efforts should be made to prevent parties from having their rights established by the courts of the land. Rather it means that adequate and effective methods of administration have never been and can never be fashioned through the judicial process. . . . The battle will be lost through the fearfully cumbersome and indirect processes of the courts, even assuming judicial approval or indulgence. . . ."¹⁰⁶

Justice Jackson, also in a book published shortly before his appointment to the bench, indicates his sympathy with the problem of administrative regulation and his belief that judicial interference should be restricted to a minimum. Criticizing the *Morgan* cases, he says that what started as an admonition to the administrative agencies "has become an admonition to the judiciary."¹⁰⁷ He quotes with approval Justice Stone's opinion in the most recent decision, and continues:

"The creation of these fact-finding tribunals has been one of the significant legal movements of the twentieth century . . . The administrative fact-finding tribunal has been the heart of nearly every social or economic reform of this century. Workmen's compensation systems, regulation of railroad and utility rates, the Securities Act, the Labor Relations Act, and many other regulatory plans would fail if the administrative body charged with enforcement could be smothered in litigation similar to that in the *Morgan* case."¹⁰⁸

He concludes this discussion optimistically (and in a manner which leaves little doubt where his own sympathies lie) when he says:

"The Supreme Court's work is increasingly that of reviewing the determinations of such bodies and its declaration in the latest

stitutional views in general, see Barnett, *Mr. Justice Black and the Supreme Court* (1940) 8 U. OF CHI. L. REV. 20.

¹⁰⁵See, for example, LAW AND POLITICS (1940) and MR. JUSTICE HOLMES AND THE SUPREME COURT (1938).

¹⁰⁶DOUGLAS, DEMOCRACY AND FINANCE (1940) 252.

¹⁰⁷JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941) 262.

¹⁰⁸*Id.* at 269.

decision of the *Morgan* case leaves no doubt that its spirit will be one of cooperation with, not one of hostility to, such agencies as Congress creates."¹⁰⁹

In view of the changes in personnel on the Court and their known attitude toward administrative justice, it is somewhat academic and perhaps even fruitless to attempt to fit cases now coming to the Court and about to come to the Court into the mould of what has in the past been required by due process of law. For—make no mistake about it—the Court is changing the “vague contours” of the due process clauses. That change seems to be in the general direction of judicial self-restraint with regard to administrative action just as it is with regard to state and federal legislative action as well.¹¹⁰ Here again, as always, the Court is remoulding the vague clauses and phrases of the Constitution to fit it to the spirit of the times. In the words of Justice Byrnes, the real dangers to the American system of constitutional democracy “will come from justices who forget the warning of Chief Justice Marshall that the Constitution should be adapted to the various crises in human affairs.”¹¹¹ Modern democracy must have the tools of legislative and administrative policy if it is to build for itself an effective governmental mechanism with which to meet the problems of modern society. A vital part of that mechanism is the administrative tribunal free to devise solutions to those problems within the limits of its statutory authority. The Supreme Court, in allowing such freedom, is not subverting the Constitution or undermining democracy. “*Administrative Justice*,” points out one federal district court judge, “is consistent, not incompatible, with our *Supremacy of the Law*.”¹¹² In the words of a recent writer:

“Governmental regulation and administrative justice must accompany each other. It has yet to be demonstrated that either of these is incompatible with a democratic form of government. From our own experience, we can draw the lesson that essential liberties can be preserved and government rendered more effective at the same time. Judges are not the only men with capacity for appreciating what is just.”¹¹³

The present constitutional tradition is flexible enough, and the precedents

¹⁰⁹*Id.* at 270. The views of Justices Reed, Murphy, and Byrnes are nowhere so clearly set out as the others. Reed has almost always been with Black in cases on administrative law, while Murphy has not distinguished himself from the new majority in any significant way in this connection. All of the new judges on the bench at the time, it should be noticed, were with the majority in the *Rowan and Nichols* decisions.

¹¹⁰See Barnett, *Constitutional Interpretation and Judicial Self-Restraint* (1940) 39 MICH. L. REV. 213.

¹¹¹N. Y. Times, June 13, 1941, p. 3, col. 5.

¹¹²*Jefferson Electric Co. v. National Labor Relations Board*, 102 Fed. (2d) 949 (C. C. A. 7th, 1939), quoted in Davey, *Separation of Function and the NLRB* (1940) 7 U. OF CHI. L. REV. 328, 346.

¹¹³Feller, *Administrative Justice* (1938) 27 SURVEY GRAPHIC 494, 528.

themselves inconclusive enough, so that the necessary readjustment between our growing administrative branch and a judiciary which is beginning to realize the nature of the change in democratic governmental institutions can take place within the framework of our fundamental law. The prospect is that such a readjustment will be successfully made.



FEDERAL COURTS AND ADMINISTRATIVE ACTION UNDER
STATE STATUTES: AN ASPECT OF THE ROWAN
& NICHOLS CASES. (L.A.)

Walter P. Armstrong, Jr.*

Last year, at the October, 1940 Term, an ancient spectre in the form of the case of *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*¹ rose to haunt the practitioners of administrative law. Many attempts had been made to lay the ghost, but it refused to remain quietly in its coffin. Undoubtedly it will walk again.

The situation, briefly, was this. One of the chief functions of the Railroad Commission is to prorate the oil and gas produced from the various fields in Texas among the numerous producers. It is given this power by a statute which states that its purpose is the prevention of waste and the conservation of natural resources, and further provides that all proration orders shall be upon a reasonable basis.² There is no question that the statute is valid and constitutional. Under its authority, the Commission promulgated a proration order limiting the amount of oil which could be produced in the East Texas oil field on what was, in effect, a per well basis.³ The Rowan & Nichols Oil Company took the position that this order, when taken in conjunction with other orders of the Commission, notably the so-called Rule 37, which provides for the spacing of wells, discriminated against it and other large producers. It contended that a per well basis was not a reasonable basis, and that therefore the order was invalid under the statute; and furthermore that the order deprived it of property without due process of law, was confiscatory, and was therefore invalid under Amendment XIV, Sec. 1 of the Federal Constitution.

The order was attacked by means of an application in the Federal District Court for an injunction against its enforcement which was granted.⁴ The Railroad Commission appealed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the decree.⁵ The case then went to the Supreme Court of the United States, which reversed in an

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1311 U. S. 570, 64 Sup. Ct. 343, 85 L. ed. 358 (1941).

²TEX. ANN. REV. CIV. STAT. (Vernon, 1935) art. 6014 *et seq.*

³The facts have been considerably simplified for the purposes of this discussion.

⁴Rowan & Nichols Oil Co. v. Railroad Commission of Texas, 28 F. Supp. 131 (D. C. Tex. W. D. 1939).

⁵Railroad Commission of Texas v. Rowan & Nichols Oil Co., 107 F. (2d) 70 (C. C. A. 5th, 1939). The original petition for a temporary injunction had been withdrawn, and so the District Court consisted of only one judge, and appeal was to the Circuit Court of Appeals rather than direct to the Supreme Court.

opinion by Mr. Justice Frankfurter, and was later amended.⁶ This was the so-called "first" *Rowan & Nichols* case.

Meanwhile the Railroad Commission had issued a new proration order to replace that which it had been enjoined from enforcing. The Rowan & Nichols Oil Company found the same weakness, statutory and constitutional in this order as it had in the previous one, and again applied for an injunction against its enforcement. This time the Humble Oil Company, another large producer, joined with it, and the two cases were combined.⁷ The injunction was granted by a three judge Federal District Court and an appeal was taken direct to the United States Supreme Court.⁸ Again that court reversed in an opinion by Mr. Justice Frankfurter.⁹ This was the so-called "second" *Rowan & Nichols* case.

Many questions were involved in these two cases, a good proportion of them in the difficult field of oil law. One which has had many reverberations outside that field, and is destined to have many more, is this: How far can, and will, the Federal courts go in reviewing the validity of orders of state administrative boards under state statutes?

Throughout the following discussion there is one important distinction which must be borne in mind. There are two types of administrative tribunals, quasi-judicial and quasi-legislative. The orders of the former are directed to particular individuals or concerns as a result of a quasi-judicial hearing by the commission going to the specific facts applicable to those individuals. Those of the latter are analogous to statutes enacted by the legislature, and while they may be and often are based upon hearings by the commission, those hearings are in the nature of committee hearings upon which legislation is often based. The order in the present case was obviously quasi-legislative, and this serves to distinguish it from many of its predecessors.

The District Court in the "first" *Rowan & Nichols* case enjoined the enforcement of the order. Whether it did so on constitutional or statutory grounds is by no means clear. In discussing complainant's contention, the District Court said:

⁶The opinion originally appeared in 310 U. S. 573, 60 Sup. Ct. 1021, 84 L. ed. 1368 (1940). The amendment may be found in 311 U. S. 614, 61 Sup. Ct. 66, 85 L. ed. 390 (1940).

⁷Humble Oil & Refining Co. v. Railroad Commission of Texas; Fischer v. Smith; Rowan & Nichols Oil Co. v. Railroad Commission of Texas, 35 F. Supp. 573 (D. C. Tex. W. D. 1940).

⁸36 STAT. 1162 (1911), 28 U. S. C. A. § 380 (1926); 26 STAT. 827 (1891), 28 U. S. C. A. § 345 (1926).

⁹Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U. S. 570, 64 Sup. Ct. 343, 85 L. ed. 358 (1941).

"The gravamen of its complaint lies in its assertion, forcibly presented, that the Commission does not allocate the allowed production among the various producers 'on a reasonable basis.' In other words, it says that granting the right of the state to conserve its natural resources, conceding for the present the validity of the Commission's order in fixing the top allowable of the field, the manner in which this allowable has been allocated to the various parties is discriminatory and constitutes a confiscation of complainant's property."¹⁰

The quotation from the statute and the reference to the conservation of natural resources seem to indicate a statutory basis; but the words "discriminatory" and "confiscation" clearly refer to the equal protection and due process clauses of the Federal constitution. Later the court says:

"The public generally has no title to this oil. If its interest in it is so great that it must needs regulate it to the extent of confiscation, then it approaches the point of expropriation and it must pay for what it does. Obviously this regulation is not proceeding upon any such theory."¹¹

This is constitutional language; and yet a few paragraphs later:

"The duty enjoined on the Commission by the Statute is to prevent waste. When in order to do that it has to limit production, then the Statute says it shall allocate the allowable on a reasonable basis. Further than that it is without power to go."¹²

And at the end of the opinion the pendulum once again swings back, and the final holding is this:

"The court is not attempting here to pass upon the order generally or upon the rights of anyone with reference to it save those of complainant. In so far as complainant is concerned, the court is of the opinion upon the evidence and the law that the order as applied and enforced is confiscatory and void."¹³

So the court has neatly sidestepped the issue. It has held the order void as to complainant without ever stating, or ever considering whether it is void on statutory or constitutional grounds. And it has confused statutory and constitutional language to such an extent that it is impossible to disentangle them. No cases are cited on the point. The entire question is left completely up in the air.

The only possible excuse for this vagueness on such an important point is that the court considered the question to be identical under the

¹⁰Rowan & Nichols Oil Co. v. Railroad Commission of Texas, 28 F. Supp. 131, 133 (D. C. Tex. W. D. 1939).

¹¹*Id.* at 135.

¹²*Id.* at 136.

¹³*Id.* at 137.

statute and the constitution. If it did, then its reasoning (and this is purely conjecture) must have been something like this:

"The legislature intended to enact a valid statute. In order to do so, it had to limit it so as to come within the due process and equal protection clauses of the Federal constitution. This is accomplished by providing that all orders should be 'on a reasonable basis.' But it did not intend to limit the powers of the commission any more than it was bound to by those clauses. Therefore the meaning of the two is coextensive; 'on a reasonable basis' really means 'on a constitutional basis.' And statute equals constitution."

But is this what the legislature intended? It is not what it said. In common usage "reasonable" does not mean "constitutional," nor does it mean "non-confiscatory." It has a much narrower meaning. Certainly the legislature intended to bring the statute within the limits of the constitution, but it may have intended, and the wording of the statute indicates that it did intend to furnish a greater degree of protection than the constitution afforded. And if it did, then the question under the two is not the same. The order could be invalid under the statute without being unconstitutional.

It is possible that the court recognized this and simply held the order invalid under the statute, applying the well established rule that a constitutional question will not be passed upon unless it is necessary to the decision of the case. But if so, why the constitutional language in the opinion? And why is the court so silent as to its method of procedure?

The affirming opinion of the Circuit Court of Appeals¹⁴ leaves no doubt as to the basis upon which it goes. The statute is neither cited nor mentioned. The court says:

"The bill alleged the order as interpreted and enforced by the Commission was unreasonable, arbitrary and confiscatory of plaintiff's property, without due process of law, in violation of the 14th Amendment, U. S. C. A. Const."

Of course the bill alleged that the order was invalid under the statute as well, but the court ignores that. And the holding is:

"The Commission had authority to regulate the development of the land and production of the oil but must allow the lease owner to produce a fair share of his oil. The findings of fact by the Commission are not conclusive. Its orders must be reasonable and not arbitrary to be valid and any person challenging their legality may resort to the court for relief. [Citing cases] Neces-

¹⁴Railroad Commission of Texas v. Rowan & Nichols Oil Co., 107 F.(2d) 70 (C. C. A. 5th, 1939).

sarily, when rights guaranteed by the Federal Constitution are infringed Federal Courts have jurisdiction."¹⁵

And so the decision is placed squarely upon the constitutional ground. Reading backward from this opinion, what the District Court actually decided, the only decision which could be affirmed by this language, was that the order was unconstitutional. Of course it would also necessarily be invalid under the statute. So long as the decision on the constitutional point stands, the statutory question is closed forever. But suppose both of these courts were wrong on the constitutional point. Suppose (and it is more than a supposition, for it is what actually happened) that the Supreme Court reversed them on that point. Must it reverse them on the statutory point as well before the order can resume its validity? Must it, or can it, pass on that point at all? That is the important question in the field of administrative law raised by this case.

A writ of certiorari was sought by the Commission and granted by the Supreme Court.¹⁶ The case was presented on elaborate briefs and arguments, including a brief filed by Mr. Norman L. Meyers of Washington, D. C., as *amicus curiae* in support of the position of the Railroad Commission. The decree was reversed in an opinion by Mr. Justice Frankfurter.¹⁷ Mr. Justice Roberts dissented in an opinion, in which Mr. Chief Justice Hughes and Mr. Justice McReynolds concurred.

Mr. Justice Frankfurter stated the problem before the court as follows:

"The question before us is the validity, when challenged by an appeal to the Fourteenth Amendment, of an oil proration order promulgated by the Railroad Commission of Texas, in so far as it applies to the respondent wells."¹⁸

There is no mention of the possibility of invalidity under the statute; and although the opinion goes on to say that the Commission derived its authority from the statute, which is cited, there is no suggestion that the statute also limits that authority. In fact the citation given, and the only reference to the statute, is "Revised Civil Statutes, Arts. 6014, *et seq.*," while it is Article 6049 which provides that the proration must be on a reasonable basis. This particular article is never referred to in the opinion.

Mr. Justice Frankfurter goes on to say, and this is the real basis of the opinion:

¹⁵*Id.* at 72.

¹⁶309 U. S. 646, 60 Sup. Ct. 613, 84 L. ed. 999 (1940).

¹⁷310 U. S. 573, 60 Sup. Ct. 1021, 84 L. ed. 1368 (1940).

¹⁸*Id.* at 577, 60 Sup. Ct. at 1022, 84 L. ed. at 1371.

"Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture, even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. Compare *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 191, *et seq.*, 82 L. ed. 734, 742, 58 S. Ct. 510."¹⁹

This clearly begs the question of validity under the statute. For as soon as the Commission promulgates an unreasonable order, it is no longer acting under legislative authority. And yet Mr. Justice Frankfurter uses the assumption that it is so acting to justify his refusal to pass on the constitutional question.

And if this assumption is withdrawn, then Mr. Justice Frankfurter's argument collapses. For it is certainly not presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under color of legislative authority, but actually outside it, offensive to the Fourteenth Amendment, if it is in fact so. That is one of the primary purposes of the Supreme Court. The Constitution protects citizens of the United States against certain abuses, among them the deprivation of property by a state without due process of law.²⁰ The purpose of the Supreme Court is to enforce this safeguard. It can not constitutionally refuse to enforce the Constitution.

Mr. Justice Frankfurter says that it would be presumptuous for courts, on the basis of conflicting expert testimony, to overthrow the ruling of the Commission. This is a surprising holding in view of the fact that almost all cases are decided on the basis of conflicting testimony, and often conflicting expert testimony. It is the purpose and duty of courts to reconcile such testimony, if possible, and to choose what will be accepted and what rejected if it must. But of course in most of these cases no administrative order is involved.

The effect of this language, then, seems to be that where such an order is involved it will not be overthrown on constitutional grounds so long as it appears that there is any substantial evidence to support it. This is a rule which had been announced in a number of previous cases,²¹ but never before applied with such stringency. And it has always been subject to the qualification that the order of the Commission must be

¹⁹*Id.* at 581, 60 Sup. Ct. at 1024, 84 L. ed. at 1373.

²⁰U. S. CONST. Art. XIV, § 1.

²¹*St. Joseph Stock Yards v. United States*, 298 U. S. 38, 56 Sup. Ct. 720, 80 L. ed. 1033 (1936).

procedurally perfect. Mr. Justice Frankfurter recognized this qualification, and said:

"In striking the balances that have to be struck with the complicated and subtle factors that must enter into such judgments, the Commission has observed established procedure."²²

Earlier in the opinion he had said that the challenged order was made "in conformity with this statute (Arts. 6014, *et seq.*) which has familiar procedural provisions." Without insisting that the reasonableness of the order is a procedural question, it is clearly improper to assume without deciding that the order was made in conformity with the statute when that is one of the very grounds upon which it is challenged. If the Commission acted outside the authority granted it by the statute, then it should not be protected by the rule enunciated above. Only in cases where the validity of the order under a state statute is unchallenged, or where that validity has previously been settled, should that rule apply.

The single case which Mr. Justice Frankfurter cites supports this proposition. In *South Carolina State Highway Dept. v. Barnwell Bros.*²³ no order of an administrative board was attacked. On the contrary the validity of the statute itself was involved. Therefore the question of statutory versus constitutional validity could not, and did not, arise. The court said:

"When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body on which rests the duty and responsibility of decision."²⁴

The question under consideration was whether a statute of the state limiting the use of its highways to trucks of a certain maximum size and weight was a constitutional exercise of police power or unconstitutional as an undue burden upon interstate commerce. The court upheld the statute.

It is obvious that the situation was entirely different from that in the *Rowan & Nichols* case. In those cases the validity of the statute was unquestioned. And where a state legislature in enacting a statute remains within its constitutional powers, certainly the statute is valid. It need not be supported by any evidence. Sometimes hearings are held as a basis for the enactment of legislation; more often they are not. But when an administrative board operating under a statute exceeds the power granted

²²310 U. S. 573, 583, 60 Sup. Ct. 1021, 1025, 84 L. ed. 1368, 1374 (1940).

²³303 U. S. 177, 58 Sup. Ct. 510, 82 L. ed. 734 (1938).

²⁴*Id.* at 191, 58 Sup. Ct. at 517, 82 L. ed. at 742.

to it by that statute and comes into conflict with the Constitution, then the courts must pass upon the validity of its orders. Otherwise the protection which the Constitution guarantees is denied.

7072 C The last point which Mr. Justice Frankfurter raises is that the problem is too complex and technical for the courts. It would be unjust to accuse him of using the court's incompetency as an excuse for not deciding the case. What he actually does say is that the facts have already been passed upon by a commission of qualified experts familiar with such problems, and that therefore courts not as well qualified and much less familiar should not upset its findings. Leaving aside the fact that the qualifications of the Commissioners, who are almost always political appointees, are at least open to question, this is still a misconception of the problem. The court is not being asked to pass upon the technical, but the legal aspects of the facts. Assuming the facts as found by the Commission to be correct, and its conclusions from them well drawn, is the order based upon those conclusions in conflict with the statute or the Constitution? This is a legal question which requires no technical knowledge and which the court is well qualified to answer. And even if it does present some difficulties, it is one which the court, at least as to the constitutional phase, is bound to answer. As Mr. Justice Roberts puts it in his dissenting opinion:

"Although the problem of proration presented technical and difficult questions, and although the Commission was vested with a broad discretion in dealing with them, these facts could not justify the court's abdicating its jurisdiction to test the Commission's order."²⁵

Mr. Justice Frankfurter makes few further references to the validity of the order under either statute or constitution. Most of the opinion is devoted to an extended discussion of the facts upon which he holds that the court is incompetent to pass. The discussion to some extent justifies this holding. He does refer to complainant's claim that the order "gives a constitutionally inadmissible advantage to smaller and more densely drilled tracts," and says that factual questions as to the reasonableness of the order "take us into that debatable territory which it is not the province of Federal courts to enter." But the most surprising statement of all occurs near the end of the opinion:

"Except where the jurisdiction rests, as it does not here, upon diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process

²⁵Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573, 584, 60 Sup. Ct. 1021, 1026, 84 L. ed. 1368, 1375 (1940).

Clause may place upon the exercise of the state's regulatory power."

In other words the court not only will not, but cannot, pass upon the validity of the order under the statute.

The sentence quoted above will not be found in the reported opinion. Counsel for complainants filed a petition for a rehearing, based on the case of *Siler v. Louisville & N. R. R.*²⁶ The motion was denied, but Mr. Justice Frankfurter saw the error of his ways, the offending sentence, along with some others, was stricken, and the opinion amended to read as follows:

"While the presence of a Federal question may also open up state issues, *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 S. Ct. 451, the claim here founded on Texas law is derived from a statute requiring proration on a 'reasonable basis.' Vernon's Texas Anno. Civ. Stat. 1925, Art. 6049c, § 7. The Texas decisions, in so far as they have been brought to our attention, do not make clear whether the local courts may exercise an independent judgment on what is 'reasonable.' Compare *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 316, 83 S. W. (2nd) 935, 87 S. W. (2nd) 1069, 99 A. L. R. 1107, 101 A. L. R. 1393. But, in any event as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in the claims under the due process clause. These latter claims we have found untenable. What ought not to be done by the Federal courts when the due process clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the Federal courts."²⁷

At last the cat was out of the bag. The question as to the power of the court to pass upon the validity of the order under the statute had been raised and met. But just what the court's answer meant remained as vague as ever.

The holding of the *Siler* case is this:

"The Federal question as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to de-

²⁶213 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753 (1909).

²⁷310 U. S. 573, 584, 60 Sup. Ct. 1021, 1025, 84 L. ed. 1368, 1375 (1940).

cide them at all, but decided the case on local or state questions only."²⁸

And, of course, the Supreme Court has the same rights on appeal. The language is permissive, not obligatory. The Court has the right to decide local questions of state law, but need not necessarily do so. But the opinion says, later:

"Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."²⁹

And yet in the *Rowan & Nichols* case the court did decide the federal question adversely to the party raising it, and then refused to pass upon the statutory question. And no important reasons were given. So the only conclusion which can be drawn is that, although it was not expressly overruled, the *Siler* case will no longer be followed in every instance.

It is possible to interpret the decision as passing upon the state question. It does say that the same range of inquiry is opened by statutory and constitutional phases, and that claims untenable under one are equally so under the other. But how can this be reconciled with the subsequent relegation of complainants to the state courts for further relief? And even if it is true, then the court has decided a federal question when it was totally unnecessary, and the *Siler* case has still gone by the board.

There are two possible explanations. Neither of them was dealt with specifically in the opinion, and whether or not either of them existed in the mind of the court is purely a matter of conjecture. One is suggested by one of the arguments advanced in the *Siler* case. It is that if the order in question was unreasonable, then the Commission was not authorized to make it. If the Commission was not acting within its authority, it was not acting as an agency of the state. If it was not acting as an agency of the state, then it was not subject to the Fourteenth Amendment. And if it was not subject to the Fourteenth Amendment, then the Federal courts had no jurisdiction. In other words, if the court held the order invalid under the statute, it would thereby destroy its own jurisdictional basis. And therefore it could not pass upon it.

This objection was overcome in the *Siler* case because some of the constitutional issues went directly to the statute itself, and were not therefore dependent upon the statutory validity of the order. But that

²⁸213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. ed. 753, 757 (1909).

²⁹*Id.* at 193, 53 L. ed. at 758.

was not the case here. The sole ground of Federal jurisdiction was the Federal question raised by the challenged constitutionality of the order under the Fourteenth Amendment.

A second possibility arises from Mr. Justice Frankfurter's use of the phrase "the extraordinary relief of an injunction in the Federal courts." An injunction is extraordinary relief. Furthermore it is purely precatory. It is entirely within the discretion of the court whether or not it will be granted. In this instance the court may simply have denied the relief sought without holding that there was no basis for the granting of such relief.

The difficulty with these ideas is inherent in all over-subtle inductions. If the decision rested upon either of these grounds, why did not the court say so? Its silence stimulated this type of rationalization, but does not support it.

Mr. Justice Roberts, in his dissent, does not attempt to rationalize the decision. He says flatly:

"The opinion of this court, in my judgment, announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established."³⁰

He then cites *Thompson v. Consolidated Gas Utilities Corp.*³¹ as controlling. An examination of the decision in that case may throw some further light upon the problem.

Plaintiffs in that case were engaged in the production of natural gas in Texas. The Railroad Commission issued an order limiting the amount of such gas which could be produced. This it was authorized to do by a statute similar to the one involved in the *Rowan & Nichols* case, but which contained no provision that the order need be reasonable. On the other hand, it did provide that the purpose of the statute was to prevent the waste of natural resources. The order was attacked on two grounds: first, that its true purpose was not to conserve natural resources, and that it bore no reasonable relationship to that object, and was therefore invalid under the statute; and second, that it was in effect confiscatory and, therefore, unconstitutional. The Court puts it in this way:

"They contend that the order is in excess of the authority which House Bill 266 confers upon the Commission; and that if

³⁰*Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 585, 60 Sup. Ct. 1021, 1026, 84 L. ed. 1368, 1375 (1940).

³¹300 U. S. 55, 57 Sup. Ct. 364, 81 L. ed. 510 (1937).

the statute be construed as conferring the authority exercised, it violates the Federal Constitution and that of the State."³²

The Court adopted the following method in dealing with this problem:

"We are always reluctant to pass upon a seriously controverted question of the meaning of a state statute, because our decision, although disposing of the particular case, cannot settle the issue of the proper construction of the statute. No court of the State has construed the Act. The defendants might, perhaps, have secured its construction by the state court. For the amendment of Sec. 266 of the Judicial Code made in 1913, 28 U.S.C.A. Sec. 380 provides that upon the institution of an appropriate suit in a state court, a stay may be had of the proceedings in the federal court to await adjudication by the state court. But no suit in a state court was instituted by the defendants to that end. When not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed, as in this instance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws. But, being under duty to make an independent study of the question, we have done so. That study leaves us in grave doubt whether the lower court has correctly interpreted the intention of the lawmakers. On the other hand, we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution. As a general rule it is no less true with reference to State than to Federal legislation that this Court will not decide an issue of constitutionality if the case may justly and reasonably be decided upon a construction of the statute under which the act is clearly constitutional. [Citing cases] But where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer."³³

How can the first sentence of this quotation be reconciled with that given earlier from the *Siler* case to the effect that if a case can be decided without reference to the constitutional question involved, it will be decided under state law? Only by adopting a teleological approach. The result is this: if the Court intends to hold the order unconstitutional, it

³²*Id.* at 58, 57 Sup. Ct. at 366, 81 L. ed. at 512.

³³*Id.* at 74, 57 Sup. Ct. at 373, 81 L. ed. at 520.

will not pass upon the statutory question. If it intends to hold it invalid under the statute, it will not pass upon the constitutional question.

Moreover the Court recognizes the possibility of obtaining a construction of the statute, and the order under it, in the state courts, but assumes that this need not necessarily be done. It says, in effect, that if such a construction is necessary to a decision of the case, and has not been made by the state court, it will be made by the Federal court. It even strongly implies what the construction would have been but it finds it unnecessary to make it.

If this reasoning is applied to the *Rowan & Nichols* case, it results in a paradox. The Commission's position is that the order was authorized by the statute; and under the above decision, the court will assume that this is true. But upon this assumption, if the order is unconstitutional, as confiscatory, then the statute is unconstitutional. And that is the only way in which complainants can prevail. A confiscatory order is certainly unreasonable. Therefore in order for the order to be invalid, "reasonable" as used in the statute must actually mean "unreasonable."

The paradox can only be avoided by passing upon the validity of the order under the statute aside from the constitutional question. And this is undoubtedly what Mr. Justice Roberts³⁴ meant when he cited the *Thompson* case as controlling. There are three ways in which an administrative order may be invalid: (a) under the statute alone; (b) under the Constitution alone; (c) under both. The *Siler* case, plus the *Thompson* case, plus the *Rowan & Nichols* case logically result in a refusal by the court to hold such an order invalid on any ground except the last. This is what Mr. Justice Roberts meant by "abdicating."

While the Supreme Court was engaged in these judicial gymnastics the Railroad Commission had put into effect another order, substantially the same in final result as the first. The District Court promptly enjoined its enforcement.³⁵ Again it refused to distinguish between constitutional and statutory grounds, saying:

"The question under the two seems to be approximately the same. If the proration is unreasonable, the statute doesn't give the Commission authority to make it. If it is so unreasonable as to be arbitrary, the Constitution does not permit it to be done either by the Legislature or the Commission."³⁶

³⁴Of course it is by no means all that Justice Roberts meant, as only one phase of the decision is being considered.

³⁵*Humble Oil & Refining Co. v. Railroad Commission of Texas; Fischer v. Smith; Rowan & Nichols Oil Co. v. Railroad Commission of Texas*, 35 F. Supp. 573 (D. C. Tex. W. D. 1940).

³⁶*Id.* at 574.

This language itself points out the difference between statutory and constitutional requirements. "So unreasonable as to be arbitrary" shows rightly that it is one of degree. One is within, but not co-extensive with, the other. The order cannot be unconstitutional and still be authorized by the statute. And unless it is authorized by the statute, under the argument of the *Siler* case it is not controlled by the Fourteenth Amendment and there is no constitutional question. Therefore the Federal Court has no jurisdiction to find the order unconstitutional, and can only hold the order good or refuse to pass on it at all.

The decision, however, is clearly upon statutory grounds. The Court says that the order is "unreasonable and therefore in violation of the Constitution and the statutes," and later that it is "not justified by good reason—is unreasonable." It never holds that it is "so unreasonable as to be arbitrary."

Appeal was direct to the Supreme Court, where the decree was again reversed. Instead of the memorandum decision usual in such cases, Mr. Justice Frankfurter felt called upon to write another lengthy opinion.³⁷ But his position upon review of the validity of the order under the statute remained the same. In fact, if anything, it was made more explicit. He said:

"The court below also erred in holding the order a violation of the Texas statute requiring proration on a 'reasonable basis.' Vernon's Texas Annotated Civil Statutes, Art. 6049c, 77. In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts."³⁸

The remainder of the opinion was devoted to the Constitutional question, holding that "the feel of the experts" would not be "supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses."

The opinions in the *Rowan & Nichols* cases, and the other related decisions discussed in connection with them, are part of the development of a general attitude on the part of the Court in regard to questions of state law.³⁹ The Court is coming to be more and more reluctant

³⁷Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U. S. 570, 64 Sup. Ct. 343, 85 L. ed. 358 (1941).

³⁸311 U. S. 570, 577, 64 Sup. Ct. 343, 347, 85 L. ed. 358, 363 (1941). The same order involved in the *Rowan v. Nichols* case has recently been held invalid under the state statute by the Supreme Court of Texas. Lone Star Gas Co. v. State, 153 S. W.(2d) 681 (Tex. 1941).

³⁹This is confirmed by subsequent decisions in the same field, notably Railroad Commission of Texas v. The Pullman Co., 312 U. S. 496, 61 Sup. Ct. 643, 85 L. ed. 971 (1941).

to pass upon such questions if it can avoid doing so, because its decision, in the words of the *Thompson* case, "although disposing of the particular case, cannot settle the issue of the proper construction of the statute." But this is bitter consolation to the particular litigant who finds himself relegated to the courts of the state to begin his legal battle anew. The pernicious feature of the Court's present position is its vagueness. As the cases now stand, the following four propositions are true:

1. In some cases, when a Federal court decides a constitutional question adversely to the party raising it, it will proceed to decide a question of state or local law.

2. In some cases, when a Federal court decides a constitutional question adversely to the party raising it, it will hold that whatever rights the state statute may afford are to be pursued in the state courts.

3. In some cases, the Court will assume that the Administrative Order is authorized by the state statute, and therefore that if the order is unconstitutional the statute is unconstitutional.

4. In some cases, the Court will assume that if the Administrative Order is unconstitutional, it is not authorized by the statute, and therefore not within the Fourteenth Amendment.

This results in complete uncertainty as to where the suit should originally be brought. If in the Federal courts, an additional suit may be necessary to determine the statutory issue; and if in the courts of the state, there is always the danger that it may be removed to the Federal court where the same problem will arise. Two lawsuits have been made to grow where only one grew before.

And so, many a long litigation is destined to end in futile indecision. The disgruntled litigant, at the end of a series of trials which have in reality accomplished nothing, may find solace with those of us who believe that when a court has proper jurisdiction it is competent to decide all of the issues necessary for a final adjudication, and must in the interests of justice decide all such issues; in the words of Francis Bacon:

"Judges ought to remember that their office is 'jus dicere,' and not 'just dare,' to interpret law, and not make law; else will it be like the authority claimed by the Church of Rome, which, under pretext of exposition of the Scripture, doth not stick to add and alter, and to pronounce that which they do not find, and, by show of antiquity, to introduce novelty."⁴⁰

⁴⁰The opening words of BACON, OF JUDICATURE (1612).

CONGRESSIONAL DELEGATIONS SINCE THE SCHECHTER CASE (LA)

Charles B. Nutting*

In the seven years which have passed since the death of the Blue Eagle, that extraordinary fowl has revealed a phoenix-like capacity to arise from its own ashes with renewed vitality. Although its aspect has altered superficially it still spreads its wings over large areas of business, and labor relations, while its shadow now extends into the fields of agriculture and finance as well. The principle of governmental control exercised through administrative agencies which it exemplified has had a rapid and continuous development until today the transition from an era of economic individualism to a period of planned economy is well-nigh complete. All of this has taken place within the framework of the same constitution which, as construed in 1935, did not permit the establishment of codes of fair competition by the President of the United States. A study of the means by which the result has been achieved throws light on the present scope and effectiveness of the doctrine of the separation of powers which is often declared to be fundamental in the American constitutional system.

THE INVALID DELEGATIONS REVIEWED

The mass of literature discussing the *Schechter*¹ and *Panama Refining Company*² cases makes unnecessary an elaborate consideration of the decisions.³ However, in order to make further treatment of the problem intelligible a brief review of their salient features is desirable. The latter case, decided shortly before the former, invalidated Section 9 (c) of the National Industrial Recovery Act⁴ which authorized the President to prohibit the transportation in interstate commerce of oil produced in violation of state laws. Speaking through Mr. Chief Justice Hughes, the court decided that the statute constituted an invalid delegation of legislative power to the chief executive, since no standard was to be found which limited

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¹A. L. A. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 Sup. Ct. 837, 79 L. ed. 1570 (1935).

²*Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. ed. 446 (1935).

³The *Schechter* case is noted in (1935) 49 HARV. L. REV. 332; (1935) 11 WIS. L. REV. 88; (1935) 33 MICH. L. REV. 1254. The *Panama* case is noted in (1935) 48 HARV. L. REV. 798; (1935) 35 COL. L. REV. 280; (1935) 83 U. OF PA. L. REV. 526; (1935) 23 GEO. L. J. 320; (1935) 2 U. OF CHI. L. REV. 632. As to delegation generally, see Weeks, *Legislative Power Versus Delegated Legislative Power* (1937) 25 GEO. L. J. 314; Duff and Whiteside, *Delegata Potestas Non Potest Delegare* (1929) 14 CORN. L. Q. 168.

⁴48 STAT. 195, 200 (1933).

his discretion or indicated the circumstances in which he was to act. The law was also criticized because, contrary to previous practice, it did not require and the executive order issued under it did not contain any statement or finding of fact indicating the reasons why the power granted by it was exercised. To sustain the statute, said the court, would make it "... idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function."⁵

The *Schechter* case, as has been said, involved the power of the President to establish "codes of fair competition" under authority granted to him by Section 3 of NIRA.⁶ Again, the delegation was declared invalid because it imposed no limits on the executive's discretion. Reference to the legislative declaration of policy contained in the statute did not indicate any standard and none was to be found in the section under consideration. The term "fair competition," unlike "unfair methods of competition," had not acquired definite meaning as a result of previous decisions and practice. "This," said Mr. Justice Cardozo in a concurring opinion, "is delegation running riot."⁷ The President was, in effect, given complete power over the entire field of industrial regulation. The constitution did not countenance such complete abdication on the part of Congress.

In addition to commenting on the lack of standards, the court adverted to the absence of any requirements regarding procedure or fact-finding which would make it possible to determine whether the administrative agency was acting within the scope of its authority.⁸ It did not discuss the problem of delegation to the respective industries of the power to frame codes, a point which was relied upon by a state court in invalidating "Little NRA" legislation.⁹ However, in *Carter v. Carter Coal Company*,¹⁰ a divided court struck down provisions of the Bituminous Coal Conservation Act of 1935¹¹ which delegated to a majority of producers and laborers the power to establish wage and hour regulations for the industry.

These cases were remarkable in that they constituted the first and only decisions in which congressional legislation has been invalidated on the ground of unlawful delegation of legislative power. The previous opinions, although they had intimated that limitations existed, had sustained successively broader delegations.¹² On the basis of such precedents, gov-

⁵293 U. S. 388, 430, 55 Sup. Ct. 241, 253, 79 L. ed. 446, 464 (1935).

⁶48 STAT. 195, 196 (1933), 15 U. S. C. A. § 701 (1939).

⁷295 U. S. 495, 553, 55 Sup. Ct. 837, 853, 79 L. ed. 1570, 1592 (1935).

⁸*Id.* at 533, 55 Sup. Ct. at 844, 79 L. ed. at 1582.

⁹*Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N. W. 420 (1935).

¹⁰298 U. S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160 (1936).

¹¹49 STAT. 991 (1935), 15 U. S. C. A. § 801 (1939).

¹²An exhaustive review of the cases is contained in the opinion of Mr. Chief Justice Hughes in the *Panama* case, 293 U. S. 388, 423, 55 Sup. Ct. 241, 250, 79 L. ed. 446, 460 (1935).

ernment counsel had flatly asserted in the *Panama* case that "The extent to which Congress is permitted to delegate authority must be determined essentially by the necessities of practical administration."¹³ Remarkable, too, was the uncertainty with which the entire subject of delegation was veiled as a result of the opinions. The possibility of future government regulation of industry was left in doubt. Proponents of the planned economy were forced to cast about for ways of detouring around these obstacles. The success of their attempts must now be considered.

pp 352-356 THE PROBLEM OF STANDARDS - *The detailed character of delegation*

It was obvious that if the objectives of the administration were to be attained, legislation making broad delegations of power was essential. Economic planning, the regulation of production, the control of labor relations and the supervision of finance cannot be carried on by Congress alone. The assistance of administrators is required. And yet, two things seem clear from the opinions referred to. First, the Supreme Court is apt to view with some misgivings statutes designed to cover all of industry at once. Secondly, an apparent if not an actual limitation of administrative discretion must be contained in the law.

Almost immediately, legislative draftsmen began to develop techniques which would make it possible to satisfy the court without any appreciable diminution of administrative authority. Within seven weeks from the decision in the *Panama* case¹⁴ the invalidated legislation was re-drafted so as to impose a blanket prohibition on the shipment of "hot oil." The operation of this section of the statute might be suspended upon the finding and proclamation by the President of a lack of parity between supply and demand constituting a burden on interstate commerce.¹⁵ The statute has ample precedent in the early embargo legislation¹⁶ and its constitutionality, which is not open to serious question, has been upheld by the Circuit Court of Appeals in two cases in Texas.¹⁷

As a result of the decision in the *Carter* case,¹⁸ the Bituminous Coal Conservation Act was redrawn. The objectionable wage-hour and other labor provisions were eliminated, although the act contained a declaration of policy favoring collective bargaining.¹⁹ It should be noted in this con-

¹³293 U. S. 388, 403.

¹⁴*Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. ed. 446 (1935).

¹⁵49 STAT. 30, 31 (1935), 15 U. S. C. A. § 715 (1939).

¹⁶2 STAT. 605, 606 (1810). *The Aurora v. United States*, 7 Cranch 382, 3 L. ed. 378 (U. S. 1813).

¹⁷*Hurley v. Federal Tender Board No. 1*, 108 F.(2d) 574 (C. C. A. 5th, 1939); *The President of the United States v. Skeen*, 118 F.(2d) 58 (C. C. A. 5th, 1941).

¹⁸*Carter v. Carter Coal Co.*, 298 U. S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160 (1936).

¹⁹50 STAT. 87 (1937), 15 U. S. C. A. § 839 (1939).

nection that provisions for wage-hour regulation and other matters concerning labor are now to be found in the National Labor Relations Act²⁰ and the Fair Labor Standards Act,²¹ so that their inclusion in this specific statute was unnecessary. The price fixing provisions of the act were upheld in *Sunshine Anthracite Coal Co. v. Adkins*,²² and will be discussed in more detail in another connection.²³

Congress made no attempt to revive the National Industrial Recovery Act *in toto*, although the labor provisions contained in most of the codes have been provided for by general law. However, the legislature of Wisconsin succeeded in redrafting the law of that state in such a way as to satisfy the objections of the court,²⁴ and it seems likely that the federal act could have been dealt with in similar fashion had it appeared politically expedient.

Thus, the practical effect of the decisions on the course of government has been obviated. Ways have been found of accomplishing the things which were forbidden under the statutes as originally drawn. However, this is not the whole story. The expanding functions of government have necessitated delegations in still other fields. Warned by the early decisions, Congress has taken care to create formal restrictions on administrative discretion, without, it is believed, depriving the administrator of sufficient discretion to accomplish the intended results.

This is well illustrated by the provisions of the Agricultural Adjustment Acts. The Supreme Court, having partially invalidated the first such statute by labeling it an unconstitutional interference with the reserved powers of the states, and declaring the provisions for benefit payments to be inextricably bound up with unlawful exactions in the form of taxes,²⁵ it was necessary to change the method of approach to the problem. This was done by divorcing payment for "soil conservation" from taxing provisions,²⁶ and by regulating production by appearing to regulate marketing.²⁷ Thus the general power of the federal government in the field was established.²⁸ However, in order to exercise the power effectively it was

²⁰49 STAT. 449 (1935), 29 U. S. C. A. § 151 (1941).

²¹52 STAT. 1060 (1938), 29 U. S. C. A. § 201 (1941).

²²310 U. S. 381, 60 Sup. Ct. 907, 84 L. ed. 1263 (1940).

²³*Delegation to Private Groups*, p. 365 *infra*.

²⁴Wis. Laws 1935, c. 182; *In re State ex rel. Attorney General*, 220 Wis. 25, 264 N. W. 633 (1936), (1936) 24 Geo. L. J. 1019, (1936) 11 Wis. L. Rev. 430.

²⁵*United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1936).

²⁶49 STAT. 163 (1935), 16 U. S. C. A. § 590 (1941).

²⁷Agricultural Adjustment Act, 52 STAT. 31 (1938), 7 U. S. C. A. § 1281 *et seq.* (1939).

²⁸The validity of the provisions for benefit payments for soil conservation when divorced from processing taxes seems to be indicated by the acceptance of a similar device employed in connection with the Social Security Act. *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 Sup. Ct. 883, 81 L. ed. 1279 (1937). As to the imposition

necessary to vest authority in the Secretary of Agriculture to establish marketing quotas and to apportion the quotas among the various producing areas and producers.

The provisions vesting authority in local committees to determine the production to be allowed will be considered in another connection.²⁹ Of more immediate interest are the standards which Congress set up ostensibly to control the discretion of the Secretary and the committees. The provisions as to tobacco,³⁰ wheat,³¹ corn,³² rice³³ and cotton³⁴ are almost identical and may therefore be considered together. Briefly, the Secretary is authorized to establish marketing quotas for these commodities when he finds that the probable production of a given commodity in any year will exceed the supply (or, in some cases the probable production). The quota usually equals a normal year's production plus a designated percentage as a reserve. A referendum to the producers is then held and if a stated minority is opposed to the imposition of the quota, it will not be imposed. However, if this is not the case, the quota is apportioned among the various producing states on the basis of their previous production for a stated number of years.

It will be observed that two principle determinations are to be made. First, shall a marketing quota be imposed? Secondly, if so, how shall it be apportioned? With respect to the first point, Congress has attempted to require the Secretary to act when a certain situation is found to exist. It has indicated what facts are to be determined and, in some cases, what evidence is to be used to determine the facts. Thus, in determining the supply of corn, the Secretary is directed to consult available statistics, including "the August production estimate officially published by the Division of Crop and Livestock Estimates of the Bureau of Agricultural Economics."³⁵ The term "normal supply" is defined with respect to each crop upon which quotas may be imposed in another section of the statute.³⁶

of marketing quotas and marketing agreements see, respectively, *Mulford v. Smith*, 307 U. S. 38, 59 Sup. Ct. 648, 83 L. ed. 1092 (1939); *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 59 Sup. Ct. 993, 83 L. ed. 1446 (1939). The latter case was followed in *H. P. Hood & Sons, Inc. v. United States*, 307 U. S. 588, 59 Sup. Ct. 1019, 83 L. ed. 1478 (1939).

²⁹*Delegation to Private Groups*, p. 365 *infra*.

³⁰52 STAT. 45 (1938), 7 U. S. C. A. §§ 1311 *et seq.* (1941).

³¹52 STAT. 52 (1938), 7 U. S. C. A. §§ 1331 *et seq.* (1941).

³²52 STAT. 48 (1938), 7 U. S. C. A. §§ 1321 *et seq.* (1941).

³³52 STAT. 60 (1938), 7 U. S. C. A. §§ 1351 *et seq.* (1941).

³⁴52 STAT. 55 (1938), 7 U. S. C. A. §§ 1341 *et seq.* (1941).

³⁵52 STAT. 60 (1938), 7 U. S. C. A. § 1352 (1941).

³⁶52 STAT. 38 (1938), 7 U. S. C. A. § 1301 (1941). This section also directs the Secretary to make use of the latest available federal statistics in making determinations required by the act.

The imposition of the total marketing quota seems also to involve a fact determination. In general, the quota is required to be sufficient to produce an amount equal to the "reserve supply level" or "normal consumption," terms which again are more precisely defined elsewhere in the act.³⁷ Up to this point it seems clear that the delegation to the Secretary is of the sort previously sustained.³⁸ It is, of course, true that in determining any fact which necessarily involves the use of complicated records and statistics a degree of discretion must be used. But it is difficult to see how Congress could have been more precise in laying down the standard to be followed, nor how it could be said that Congress was abdicating in favor of the Secretary.

Less orthodox, however, are the delegations to local committees which apportion the quotas among the farmers. In the case of tobacco, for example, Congress has directed the Secretary to provide through local committees for the apportionment of production, "on the basis of the following: Past marketing of tobacco, making *due* allowance for drought, flood, hail, *other abnormal* weather conditions, plant bed and *other* diseases; land, labor and equipment available for the production of tobacco; crop-rotation practices; and the soil and *other* physical factors affecting the production of tobacco."³⁹

When the Supreme Court of the United States encountered this provision it was content to observe:

"Certainly fairness requires that some such adjustment [to take care of factors abnormally affecting production] shall be made. The Congress has indicated in detail the considerations which are to be held in view in making these adjustments, and, in order to protect against arbitrary action, has afforded both administrative and judicial review to correct errors. This is not to confer unrestrained arbitrary power on an executive officer. In this aspect the Act is valid within the decisions of this court respecting delegation to administrative officers."⁴⁰

It will be noted that the court emphasizes two points—the detailed *character of the delegation* and the *opportunities for review*. The latter will be considered subsequently.⁴¹ As to the former, it appears that the limitations of discretion are illusory. Congress has probably enumerated every factor which might be taken into consideration in apportion-

³⁷*Ibid.*

³⁸*The Aurora v. United States*, 7 Cranch 382, 3 L. ed. 378 (U. S. 1813); *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 493, 36 L. ed. 294 (1892); *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 48 Sup. Ct. 348, 72 L. ed. 624 (1928).

³⁹52 STAT. 47 (1938), 7 U. S. C. A. § 1313(b) (1941). Italics supplied.

⁴⁰*Mulford v. Smith*, 307 U. S. 38, 49, 59 Sup. Ct. 648, 653, 83 L. ed. 1092, 1100 (1939).

⁴¹*Formal Fact Finding*, p. 363 *infra*.

ing the quota and has instructed the administrators to take those factors into consideration. Furthermore, it has made no attempt to prescribe the weight to be given to any one factor, simply directing that "due" allowance shall be made. The only difference between the delegation here and that involved in the *Schechter* case is that here the legislature took the trouble to enumerate all the things the delegate might do, while in the other situation it made the delegation in general terms. Yet when the actual power of the delegate is considered it seems to be virtually the same in both cases.

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The point is more aptly illustrated in connection with the marketing agreements which the Secretary of Agriculture is authorized to secure. The Agricultural Adjustment Act contains a declaration of policy, which, briefly, is to establish prices for farm products which will give them a purchasing power with respect to articles that farmers buy which is equal to that of a "base period."⁴² "In order to effectuate the policies of the Act," the Secretary of Agriculture is authorized but not required to enter into marketing agreements with the producers of certain commodities, including milk.⁴³ In the case of milk, it is provided that if the Secretary decides to impose a marketing agreement, it shall contain one or more of a number of terms indicated in the statute, including the classification of milk and the imposition of uniform prices.⁴⁴ The agreements are to be effective in such areas as are "practical."

The court, which unanimously refused to permit the delegation to the President involved in the National Industrial Recovery Act was able to muster a majority in favor of permitting the delegation just described.⁴⁵ It was asserted that the Secretary, unlike the President, was limited in the exercise of his discretion by the enumeration of certain commodities to which the statute was applicable. The standard of practicality in determining the areas to be subject to the marketing agreements was declared to be sufficiently definite, while the provisions as to price fixing, although admittedly vague, were said not to be beyond the power of Congress to prescribe.

The dissent of Mr. Justice Roberts,⁴⁶ who wrote the majority opinion in *Mulford v. Smith*,⁴⁷ seems almost unanswerable. While it is true, he

⁴²52 STAT. 38 (1938), 7 U. S. C. A. § 1301(a) (1).

⁴³48 STAT. 31 (1933), 7 U. S. C. A. § 608c (1939).

⁴⁴*Ibid.*

⁴⁵*United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 574-577, 59 Sup. Ct. 993, 1013-1014, 83 L. ed. 1446, 1470-1472 (1939). See also the companion case of *H. P. Hood & Sons, Inc. v. United States*, 307 U. S. 588, 59 Sup. Ct. 1019, 83 L. ed. 1478 (1939).

⁴⁶*H. P. Hood & Sons, Inc., v. United States*, 307 U. S. 588, 603, 59 Sup. Ct. 1019, 1027, 83 L. ed. 1478, 1489 (1939).

⁴⁷307 U. S. 38, 59 Sup. Ct. 648, 83 L. ed. 1092 (1939).

points out, that the Secretary is limited to certain enumerated commodities, there is no substantial limitation of his discretion in deciding whether or not to impose marketing agreements with reference to them. The restoration of parity prices, declared to be the policy of the act, is as indefinite a goal as the establishment of codes of fair competition. When the Secretary does decide to impose a marketing agreement, he is given the choice, in the case of milk, of different and mutually exclusive methods of control. Thus, in the opinion of the Justice, he is given authority first to decide whether or not there shall be a law and secondly, what kind of a law there shall be.

An analysis of the statutory provisions referred to confirms the conclusion that Congress has again granted virtually unlimited discretion under the cloak of apparently detailed restrictions. While the court has avoided direct conflict with the *Schechter* case, it seems evident that its practical influence on the course of legislation has been considerably diminished if not obliterated. It should be remembered, however, that assuming the validity of the purpose of the agricultural program, its accomplishment would have been rendered impossible if the court had taken a narrow view of permissible delegation. The adjustment of production and the control of price involve such various and variable factors that detailed legislative direction would be worse than useless in the development of a workable program.

Another, though probably non-litigable, instance of illusory detailed delegation is to be found in the various appropriation acts dealing with work relief. For example, the Emergency Relief Appropriation Act of 1941⁴⁸ appropriates a sum of money for providing "work for needy persons on useful public projects." The funds are available, upon approval by the President, for some twenty-seven general types of projects, ending with "miscellaneous projects." It seems obvious that the delegation here is one of almost unlimited authority to the President to determine how the public funds are to be spent. Again, however, it would be difficult to suggest a narrower type of delegation which would be practically effective in view of the necessity for prompt action in administering relief. Otherwise, of course, specific provision might be made for each project, as is done in the Rivers and Harbors bills, for example.⁴⁹

Another instance of delegation of the power to spend money is found in the Social Security Act⁵⁰ by the terms of which the Board⁵¹ is given

⁴⁸54 STAT. 611 (1940), 15 U. S. C. A. p. 65 (Supp. 1940).

⁴⁹*E.g.*, 44 STAT. 1010 (1927).

⁵⁰49 STAT. 620 (1935), 42 U. S. C. A. § 301 (1941).

⁵¹Now, by executive order, a part of the Federal Security Agency. 4 FED. REG. 2727 (1939), 53 STAT. 1243 (1939), 5 U. S. C. A. § 133t, n. (1941).

power to determine the amount to be granted to the states in connection with the administration of unemployment compensation laws. As a primary standard the Board is limited to the amount which it determines to be necessary for the proper administration of the law.⁵² It is also directed to take into account the population of the state, an estimate of the number of people covered by the state law and "such other factors as the Board finds relevant."⁵³

In view of the wide latitude permitted Congress in delegating the spending power⁵⁴ there seems no reason to question the constitutionality of the delegation, although the point has not been specifically determined by the court.⁵⁵ However, it must be conceded that if the provisions of the law are analyzed it again appears that the limits placed on administrative discretion are more apparent than real. The determination of what is "proper administration" obviously involves the use of judgment, and the power to consider "other factors" which the Board finds relevant opens unbounded fields for consideration. Again, however, it seems clear that if the purposes of the statute are to be accomplished, administrative discretion must not be closely fettered.

The Federal Food, Drug and Cosmetic Act of 1938 presents an interesting combination of broad delegation and detailed legislative definition. The definitions of adulteration and misbranding of drugs contained in the statute⁵⁶ are drawn with extreme care and precision. On the other hand, the Secretary⁵⁷ is directed to promulgate regulations fixing "reasonable" standards of identity, quality and fill of container "whenever . . . such action will promote honesty and fair dealing in the interest of consumers."⁵⁸ In other instances he is authorized to promulgate such regulations "as may be necessary to protect the public health."⁵⁹ These provisions clearly fall within the pattern of permissible delegations and may be dismissed without further comment save the observation that many years of experience with the problem⁶⁰ enabled Congress to draft legislation which on the whole is much more definite than that to be found in connection with the later types of regulation.

⁵²See Orfield, *Taxation under the Federal Social Security Act: Constitutional and Regulatory Aspects* (1937) 23 CORN. L. Q. 85, 108.

⁵³49 STAT. 626 (1935), 42 U. S. C. A. § 502 (1941).

⁵⁴See *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 57 Sup. Ct. 764, 81 L. ed. 1122 (1937).

⁵⁵In *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 Sup. Ct. 883, 81 L. ed. 1279 (1937) the court did not find it necessary to consider this provision of the act.

⁵⁶52 STAT. 1049, 1050 (1938), 21 U. S. C. A. §§ 351, 352 (1941).

⁵⁷Now, by executive order, the Federal Security Administrator. 5 FED. REG. 2421 (1940), 54 STAT. 1234 (1940), 5 U. S. C. A. § 133t, n. (1941).

⁵⁸52 STAT. 1046 (1938), 21 U. S. C. A. § 341 (1941).

⁵⁹E.g., 52 STAT. 1049 (1938), 21 U. S. C. A. § 346(a) (1941).

⁶⁰See the Symposium *The Protection of the Consumer of Food and Drugs* (1933) 1 LAW & CONTEMP. PROB. 1-133 *passim*.

This point is illustrated by a comparison between the Food and Drug Act and the various statutes regulating financial transactions. The Securities Act of 1933,⁶¹ the Securities Exchange Act of 1934,⁶² the Public Utility Holding Company Act of 1935,⁶³ and the Investment Companies Act of 1940⁶⁴ taken together constitute almost complete domination of finance by the federal government. Prior to the passage of the first of the enactments little had been done in the way of federal regulation. Thus it was necessary to proceed by a process of trial and error. In addition, the business to be regulated was highly technical in its nature and subject to rapid change. The complex of factors necessitated broad grants of power to the administrative agent, with respect to both rules and investigations. To enumerate the delegations would be impractical, especially since the problem with respect to the Securities Exchange Act of 1934 has been ably dealt with.⁶⁵ It is sufficient to remark that in addition to granting the Commission many specifically enumerated powers⁶⁶ the acts in literally dozens of instances grant authority to that body to make regulations which it "deems necessary or appropriate in the public interest or for the protection of investors."⁶⁷

In these statutes, then, Congress has used a combination of broad grants of power such as those denounced in the *Schechter* case, and illusory detailed delegation of the sort encountered in connection with agricultural regulation. It should be noted that the first two laws were enacted before the decision in that case so that Congress had not been put on notice that its power was likely to be challenged. But since it has allowed the acts to continue in operation without substantial amendment in spite of ample opportunity for change, they may be appropriately considered in this discussion. It is a curious fact that the validity of the delegations is not discussed in the cases.⁶⁸ The practical impossibility of imposing more specific standards may well have influenced the court in this regard.

⁶¹48 STAT. 74 (1933), 15 U. S. C. A. § 77a (1941).

⁶²48 STAT. 881 (1934), 15 U. S. C. A. § 78 (1941).

⁶³49 STAT. 838 (1935), 15 U. S. C. A. § 79 (1941).

⁶⁴54 STAT. 789 (1940), 15 U. S. C. A. § 80 (1941).

⁶⁵Legis. (1936) 36 COL. L. REV. 974.

⁶⁶*E.g.*, 48 STAT. 85 (1933), 15 U. S. C. A. § 77s (1941); 48 STAT. 898 (1934), 15 U. S. C. A. § 78s (1941); 49 STAT. 834 (1935), 15 U. S. C. A. § 79t (1941); 54 STAT. 841 (1941), 15 U. S. C. A. §§ 80a-37 (1941).

⁶⁷This, with minor variations, is the standard contained in almost every section of the acts dealing with the various aspects of the rule making power of the Commission.

⁶⁸Although a particular administrative practice was held objectionable, the Securities Act as a whole has been sustained. *Jones v. Securities and Exchange Comm.*, 298 U. S. 1, 56 Sup. Ct. 654, 80 L. ed. 1015 (1936). As to the Securities Exchange Act, see *Wright v. Securities and Exchange Comm.*, 112 F.(2) 89 (C. C. A. 2d, 1940). As to the Holding Company Act, see *Electric Bond & Share Co. v. Securities and Exchange Comm.*, 303 U. S. 419, 58 Sup. Ct. 678, 82 L. ed. 936 (1938).

Furthermore, regulation is confined to a definite area and procedural limitations make it possible to exert control over the activities of the administrator.⁶⁹

In general, statutes creating new independent boards and commissions are sufficiently analogous to those involving such bodies as the Interstate Commerce⁷⁰ and Federal Trade⁷¹ Commissions to make detailed discussion unnecessary. However, in a few instances unusual grants of authority appear. Thus, after a broad declaration of policy⁷² the Civil Aeronautics Act vests general power in the Authority to perform such acts and make such rules as it shall deem necessary to execute the act.⁷³ In addition, the Administrator is directed "to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad . . ."⁷⁴ and to exercise in general the powers and duties of the Authority.⁷⁵ These include, in addition to the power to fix rates, regulate consolidations and grant or withhold certificates of public convenience and necessity,⁷⁶ authority to exempt classes of carriers from certain provisions of the act,⁷⁷ to license operators of aircraft,⁷⁸ to inspect equipment,⁷⁹ to establish safety regulations,⁸⁰ to amend, suspend and revoke certificates,⁸¹ and to require the giving of notice of proposed building near civil airways.⁸² An unusual provision is that requiring the approval of the President regarding certificates relating to foreign commerce.⁸³

The Federal Power Commission also has rate fixing and other powers of the usual sort.⁸⁴ In addition it is directed to divide the country into districts "For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural re-

⁶⁹See, *e.g.*, the provisions for judicial review, 48 STAT. 80 (1938), 15 U. S. C. A. § 77i (1941); for rule making, 52 STAT. 1173 (1939), 15 U. S. C. A. § 77sss (1941); 49 STAT. 820 (1935), 15 U. S. C. A. § 79k (b), (1) (1941).

⁷⁰24 STAT. 383 (1887), 49 U. S. C. A. § 11 (1929).

⁷¹38 STAT. 717 (1914), 15 U. S. C. A. § 41 (1941).

⁷²52 STAT. 980 (1938), 49 U. S. C. A. § 402 (1941).

⁷³52 STAT. 984 (1938), 49 U. S. C. A. § 425 (1941).

⁷⁴52 STAT. 985 (1938), 49 U. S. C. A. § 451 (1941).

⁷⁵52 STAT. 986 (1938), 49 U. S. C. A. § 458 (1941).

⁷⁶52 STAT. 992, 993 (1938), 49 U. S. C. A. §§ 484, 485 (1941); 52 STAT. 1001 (1938), 49 U. S. C. A. § 488 (1941); 52 STAT. 987 (1938), 49 U. S. C. A. § 481 (1941).

⁷⁷52 STAT. 1004 (1938), 49 U. S. C. A. § 496 (1941).

⁷⁸52 STAT. 1008-1010 (1938), 49 U. S. C. A. §§ 552-554 (1941).

⁷⁹52 STAT. 1010 (1938), 49 U. S. C. A. § 555 (1941).

⁸⁰52 STAT. 1007 (1938), 49 U. S. C. A. § 551 (1941).

⁸¹52 STAT. 1011 (1938), 49 U. S. C. A. § 559 (1941).

⁸²52 STAT. 1026 (1938), 49 U. S. C. A. § 671 (1941).

⁸³52 STAT. 1014 (1938), 49 U. S. C. A. § 601 (1941).

⁸⁴49 STAT. 852 (1935), 16 U. S. C. A. §§ 824e-824g (1941).

sources.”⁸⁵ It is authorized by the same section to make such modifications of its original orders “as in its judgment will promote the public interest.”⁸⁶ A general rule making power is also contained in the statute.

The Federal Communications Commission enjoys powers closely similar to those granted to the Interstate Commerce Commission. However, the broad delegation of authority over radio transmission, limited only by “public convenience, interest or necessity” should be noted.⁸⁷ Delegations to the National Labor Relations Board⁸⁸ and the Wage-Hour Administrator⁸⁹ are not sufficiently startling to require comment.

In addition to granting authority to independent commissions and executive officers, Congress has made numerous delegations of power to governmental corporations. In 1940 there were at least 1469 of these institutions⁹⁰ and although a few have been eliminated⁹¹ the total number has probably not decreased materially. It seems evident that Congress may use the device whenever it is appropriate to carrying out a constitutional power.⁹² In so doing, it has vested discretionary powers of considerable importance in the corporations.⁹³ As an illustration, the Tennessee Valley Authority may be cited. The enumerated powers of this body include eminent domain, the acquisition of realty by other methods, the construction of dams and the power “to advise and cooperate in the readjustment of population displaced” by such construction.⁹⁴ The sale⁹⁵ and equitable distribution⁹⁶ of surplus power and the construction of transmission lines⁹⁷ are among the other powers delegated by the act. In general, the powers

⁸⁵49 STAT. 847 (1935), 16 U. S. C. A. § 824a (1941).

⁸⁶49 STAT. 858 (1935), 16 U. S. C. A. § 825h (1941).

⁸⁷48 STAT. 1082 (1934), 47 U. S. C. A. § 303 (1941).

⁸⁸49 STAT. 449-457 (1935), 29 U. S. C. A. §§ 151-166 (1941). The delegation to the Board of power to determine the appropriate bargaining unit in a labor dispute has been upheld. The court pointed out that the powers of the Board lie within the area covered by the words “employer,” “plant,” and “craft.” The definite and elaborate statement of policy contained in the statute was also referred to as constituting a standard. *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 61 Sup. Ct. 908, 85 L. ed. 1251 (1941).

⁸⁹52 STAT. 1060-1069 (1938), 29 U. S. C. A. §§ 201-219 (1941). The delegations are discussed and upheld by the Supreme Court in *Opp Cotton Mills v. Administrator of Wage and Hour Division*, 312 U. S. 126, 61 Sup. Ct. 524, 85 L. ed. 624 (1941).

⁹⁰SEN. DOC. NO. 172, 76th Cong., 3d. Sess. (1940) 4.

⁹¹Under the various reorganization plans a number of corporations, especially those dealing with relief, were consolidated under the Federal Loan Agency and the Department of Agriculture. The reorganization plans are conveniently collated in 5 U. S. C. A. § 133t, n. (Supp. 1940).

⁹²Schnell, *Federally Owned Corporations and Their Legal Problems* (1936) 14 N. C. L. REV. 238.

⁹³Pinney, *Delegation of Powers To and Within Corporations* (1938) 16 N. C. L. REV. 232.

⁹⁴48 STAT. 60 (1933), 16 U. S. C. A. § 831c (1941).

⁹⁵48 STAT. 64 (1933), 16 U. S. C. A. § 831i (1941).

⁹⁶48 STAT. 64 (1933), 16 U. S. C. A. § 831j (1941).

⁹⁷48 STAT. 65 (1933), 16 U. S. C. A. § 831k (1941).

are limited only by the declaration of policy,⁹⁸ which is nearly as broad as the similar section of the National Industrial Recovery Act,⁹⁹ although limited to a particular geographical area.

The current national emergency has occasioned very broad grants of authority to the President in connection with national defense. Most of the governmental organizations administering the program have been created by executive order as part of the Executive Office of the President, authorized by the provisions of the Reorganization Act.¹⁰⁰ The Aid to Democracies Act¹⁰¹ permits the President to authorize his subordinates to exercise broad powers regarding the manufacture, lease or sale of defense articles when "he deems it in the interest of national defense." Assuming the possibility of judicial review, it may be supposed that the President, as commander-in-chief of the army and navy may exercise vaguely delegated powers for the same reasons that he is permitted a similar latitude in the conduct of foreign affairs.¹⁰²

A review of these delegations which, of course, are but a few of those actually to be found in federal legislation, results in the conclusion that the matter of standards is not one of substantive constitutional law but simply one of legislative technique. When it has seen fit to do so, Congress has been able to accomplish anything it has desired as far as vesting power in administrative or executive officials is concerned. Two points only must be borne in mind. Some care must be exercised in confining a single act to a relatively limited area. The Supreme Court, very properly it would seem, will not strain at gnats even though it may refuse to swallow camels. If agriculture is to be regulated, therefore, it is desirable to provide in separate acts for soil conservation, price fixing under marketing agreements, and the control of production. It is well to separate provisions dealing with unfair labor practices from wage-hour laws and enactments relating to trade practices. This being done, the second qualification becomes operative.

Congress should appear to be specific as possible in making grants of power. If the field is one in which regulation is not novel, as in the

⁹⁸48 STAT. 58 (1933), 16 U. S. C. A. § 831 (1941). See *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 56 Sup. Ct. 466, 80 L. ed. 688 (1936).

⁹⁹48 STAT. 195 (1933), 15 U. S. C. A. § 701 (1939).

¹⁰⁰53 STAT. 813 (1939), 5 U. S. C. A. § 133 (1941). This act is noteworthy because it provides for "laying on the table," a device common in England, but hitherto not adopted in the United States. Reorganization plans are submitted to Congress by the President and, if not rejected by that body, become effective.

¹⁰¹H. R. REP. No. 11, 77th Cong., 1st Sess. (1941) 1776. The so-called Neutrality Act, 54 STAT. 4-7 (1939), 22 U. S. C. A. § 245j (1941) vested authority in the chief executive similar to that found in early embargo legislation. *The Aurora v. United States*, 7 Cranch 382, 3 L. ed. 378 (U. S. 1813).

¹⁰²*United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 57 Sup. Ct. 216, 81 L. ed. 255 (1936).

control of utilities, this requirement may be disregarded, since phrases such as "public convenience and necessity" and "reasonable rates" seem to have acquired an aura of respectability through years of use. In highly technical fields where administrative experience must be developed, similar latitude is apparently permissible, as is indicated by the financial legislation previously discussed. But if there is doubt as to whether a given delegation may be sustained, Congress may make use of what has been called illusory detailed delegation in this article. This consists simply in listing everything which the administrator may possibly do, and then instructing him to do only one or more of those things, as his judgment dictates. The court will happily accept this device as a solution to the dilemma of formal adherence to the doctrine of non-delegation versus the practical necessity of delegating powers.

FORMAL FACT FINDING = *no requirement to*
certify

It will be recalled that in both the *Panama Refining* and *Schechter* cases¹⁰³ the invalidated legislation was criticized for failing to provide that the administrator should make and proclaim formal findings of the facts necessary to bring the legislation into operation. The extent to which such action is necessary from the constitutional standpoint cannot be discovered from those cases, nor do later decisions throw much light on the problem.

Legislative practice has not been consistent in this regard. The laws regulating financial transactions through the Securities and Exchange Commission are noteworthy for the general absence of any such requirement.¹⁰⁴ However, the first of these laws was drawn before the two decisions just mentioned and later legislation has followed the model of the Securities Act of 1933. Later enactments, possibly influenced by the opinions, make a variety of requirements, ranging from the detailed provisions of the Food, Drug and Cosmetic Act of 1938¹⁰⁵ to the rather perfunctory directions of the Civil Aeronautics Act of 1938.¹⁰⁶ Various provisions of the Agricultural Adjustment Acts¹⁰⁷ specifically require both a finding and

¹⁰³*The Invalid Delegations Reviewed*, p. 350 *supra*.

¹⁰⁴As has been pointed out, the legislative standards limiting the discretion of the Commission are very broad. Sections of the various laws dealing with the general powers of the Commission impose no further restriction. See 53 STAT. 1173 (1939), 15 U. S. C. A. § 77sss (1941); 48 STAT. 901 (1934), 15 U. S. C. A. § 78w (1941); 49 STAT. 83 (1935); 15 U. S. C. A. § 79t (1941); 54 STAT. 841 (1940), 15 U. S. C. A. §§ 80a-37 (1941).

¹⁰⁵52 STAT. 1055 (1938), 21 U. S. C. A. § 371 (1941).

¹⁰⁶*E.g.*, 52 STAT. 1004 (1938), 49 U. S. C. A. § 496 (1941); 52 STAT. 987 (1938), 49 U. S. C. A. § 481(d) (1941).

¹⁰⁷*E.g.*, the provisions imposing marketing quotas. These are all substantially alike. The provisions as to tobacco are found in 52 STAT. 46, 120 (1938), 7 U. S. C. A. § 1312 (1939).

a proclamation by the Secretary in order to make the administrative procedure operative. It seems impossible to discern any uniform or consistent pattern in the various regulatory laws.

Administrative practice has, on the whole, tended toward the insertion of formal statements of fact-finding in connection with the rule making power. In submitting reorganization plans to Congress, the President has ordinarily included a statement of the facts underlying the proposed changes.¹⁰⁸ Although an exhaustive survey has not been attempted, it seems evident that various administrative agencies have developed set forms for the promulgation of rules and orders which contain perfunctory and general statements of findings, often in the language of the statute.¹⁰⁹

No case has been found in which it has been held that a delegation is invalid unless it requires the administrator to make a formal statement that he has found the necessary facts to exist as a condition precedent to the exercise of his authority. However, the federal courts have insisted that before administrative action under such a statute will be sustained, there must be a recitation of the facts justifying the action.¹¹⁰ It seems evident that this requirement does not go to the question of the validity of the delegation itself but simply to the manner of its exercise. Thus, a statute may be constitutional even though it does not require a formal finding of fact, but such a finding will be required if action under the statute is to be sustained by the court. Apparently this is considered a part of procedural due process,¹¹¹ at least as far as the "quasi-judicial" activities of administrative agencies are concerned. With respect to "quasi-legislative activities," where it is possible that due process requires no hearing at all,¹¹² it would seem doubtful if a fact-finding recitation should be necessary.

In any event, the necessity of the requirement is open to question, since apparently it may be satisfied by a purely formal recitation of the statutory language.¹¹³ If this is true, the court knows no more than

¹⁰⁸See 5 U. S. C. A. § 133t, n. (Supp. 1940).

¹⁰⁹See, e.g., orders appearing in 6 FED. REG. 5029, 5030, 5147, 4964 (1941) (Agriculture); 6 FED. REG. 4964, 4985 (1941) (S. E. C.); 6 FED. REG. 5036, 5054 (1941) (C. A. A.).

¹¹⁰United States v. Baltimore & Ohio R. R., 293 U. S. 454, 55 Sup. Ct. 268, 79 L. ed. 587 (1935); Phelps-Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 197, 61 Sup. Ct. 845, 853, 85 L. ed. 1271, 1284 (1941); Twin City Milk Producers Ass'n v. McNutt, 122 F.(2d) 564 (C. C. A. 8th, 1941).

¹¹¹See Panama Refining Co. v. Ryan, 293 U. S. 388, 432, 55 Sup. Ct. 241, 253, 79 L. ed. 446, 465 (1935).

¹¹²See Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 53 Sup. Ct. 350, 77 L. ed. 796 (1933).

¹¹³See the orders cited note 109 *supra*. In response to the opinion in Twin City Milk Producers Ass'n v. McNutt, 122 F. (2d) 564 (C. C. A. 8th, 1941) the Admin-

it did before when the validity of the order is attacked. The only explanation which has been vouchsafed is, to put it somewhat more bluntly than the courts have permitted themselves to do, that it helps keep administrative agencies honest. Assuming a purpose on the part of the administrator to exceed his authority, the efficacy of this sanction is open to doubt. There may be certain procedural advantages in requiring a clear paper record but substantially it seems to make little difference to the victim of regulation.

validity
1

DELEGATION TO PRIVATE GROUPS

The notion of self governing industry is superficially appealing since it carries with it an appearance of democracy. It also represents a device to give effect to the increasingly important group economic interests emergent in modern society. And yet, to give a group complete authority to govern itself is to free it from any obligation toward the rest of the community. The task then becomes one of reconciling group with general interest. One aspect of the problem has concerned the validity of delegating price fixing and other regulatory powers to industry committees. Since it has been considered at some length elsewhere,¹¹⁴ a brief treatment will be sufficient.

In the *Carter* case,¹¹⁵ the Guffey Coal Act was invalidated because it delegated power to make wage-hour agreements to a group of laborers and producers. When the Bituminous Coal Act was drafted, it included price fixing provisions which also involved elements of this type of delegation. Under the statute¹¹⁶ however, prices are *proposed* by industry committees but *imposed* by the administrative agency, which is an instrumentality of the government. In the *Sunshine Coal* case¹¹⁷ the court took the position that this circumstance indicated the absence of an unlawful delegation of legislative power to the industry.

istrator amended the order to read: "On the basis of all the evidence of record, and the foregoing findings of fact, it is found and concluded that the regulation fixing and establishing a standard of identity for dried skim milk hereinafter prescribed will promote honesty and fair dealing in the interest of consumers." 6 FED. REG. 4933 (1941).

¹¹⁴Jaffe, *Law Making by Private Groups* (1937) 51 HARV. L. REV. 201.

¹¹⁵*Carter v. Carter Coal Co.*, 298 U. S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160 (1936).

¹¹⁶50 STAT. 77 (1937), 15 U. S. C. A. § 833 (1939).

¹¹⁷*Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 Sup. Ct. 907, 84 L. ed. 1263 (1940). An interesting question, not involved in federal legislation, arises when the members of the state agency are also members of the industry being regulated. Cf. *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 53, 183 So. 759, 780 (1938) with *Johnson v. Michigan Milk Marketing Board*, 295 N. W. 346 (Mich. 1940), (1941) 54 HARV. L. REV. 872. The question here seems to be one of fair hearing under the "due process clause" rather than delegation. The Michigan court apparently took the position that a fair hearing could not be given by persons financially interested in the matter, while the Florida court concluded that in the absence of showing of unfairness, the hearing was valid. Since the board performs legislative functions in these cases, it is questionable whether any hearing at all is necessary. However, if one is granted it should be conducted in accordance with the principles of "due process."

Congress has adopted the same technique with reference to the apportioning of marketing quotas among local producers. Instead of granting local committees the power to impose quotas, it is provided that the Secretary shall do so through the local committees.¹¹⁸ It seems clear that as long as the formal grant of power is to a government official rather than a private group, it will be sustained no matter what the facts are with respect to its actual exercise.

In general the same principle seems to apply to the vexing problem of referenda.¹¹⁹ The operation of several federal regulatory measures is ultimately dependent on the approval of a majority of the group to be regulated.¹²⁰ However, since the regulation again is technically imposed by the government instead of the group it seems to involve no unconstitutional delegation.¹²¹

It therefore seems evident that here, as in connection with the problem of standards, the accomplishment of the legislative purpose is merely a matter of technique. If the ultimate power ostensibly remains with the government rather than the industry, delegations which are substantially the same as that invalidated in the *Carter* case are permissible.

COMMENT

The survey of congressional delegations since the *Schechter* case indicates that if the opinion was intended to raise any substantial barriers to delegation of legislative power by Congress it has failed to achieve

¹¹⁸This is true as to all commodities covered by the statute. See, e.g., 52 STAT. 53 (1938), 7 U. S. C. A. § 1334 (c) (1939).

¹¹⁹The matter has arisen in a variety of forms and has been widely discussed prior to the legislation now under consideration. The cases have adopted divergent and inconsistent views of the matter, which are not within the scope of this article. See note (1932) 76 A. L. R. 1053 *passim*. A connected problem is that of delegating power to another legislature or an official of another government. This has been especially acute in instances where the states have attempted to frame legislation complementary to federal regulatory laws. In general, such delegation has been invalidated by recent cases. See *Smithburger v. Banning*, 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686 (1935); *Darwiger v. Staats*, 267 N. Y. 290, 196 N. E. 61 (1935); *Griffiths v. Robinson*, 181 Wash. 438, 43 P. (2d) 977 (1935); *Uhden v. Greenough*, 181 Wash. 412, 43 P. (2d) 983, 98 A. L. R. 1181 (1935). Cf. *State v. Matson Co.*, 182 Wash. 507, 47 P. (2d) 1003 (1935). See Withrow, *The Adoption by States of Present and Future Federal Legislation* (1935) 20 CORN. L. Q. 504.

¹²⁰E.g., the imposition of marketing quotas, discussed p. 353 *supra*; in connection with milk marketing agreements see 49 STAT. 753 (1935), 7 U. S. C. A. § 608(c) (19) (1939); in connection with tobacco markets see 49 STAT. 732 (1935), 7 U. S. C. A. § 511d (1939).

¹²¹*Currin v. Wallace*, 306 U. S. 1, 59 Sup. Ct. 379, 83 L. ed. 441 (1939); *United States v. Rock Royal Co-operative*, 307 U. S. 553, 59 Sup. Ct. 993, 83 L. ed. 1446 (1939); *H. P. Hood & Sons v. United States*, 307 U. S. 588, 59 Sup. Ct. 1019, 83 L. ed. 1478 (1939). This seems to be true in most of the states where the problem has arisen. *Jersey Made Milk Products v. Brock*, 13 Cal. (2d) 620, 91 P. (2d) 577 (1939); *Bohannon v. Duncan*, 185 Ga. 840, 196 S. E. 897 (1938); *Holcomb v. Georgia Milk Products Confederation*, 3 S. E. (2d) 705 (Ga. 1939); *Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116 (1935). See Notes (1940) 39 MICH. L. REV. 313; (1941) 54 HARV. L. REV. 870; (1940) 38 MICH. L. REV. 540.

its goal. The scope and variety of delegations which have been either sustained or unchallenged show that the administrative process has not been unduly impeded by judicial objections to the granting of authority. Further, the study seems to establish the point already mentioned, that legislative techniques are available whereby the formal requirements imposed by the *Schechter* and *Panama* cases may be satisfied as far as the Supreme Court is concerned. The cases may remain as a warning to Congress not to go too far too fast. But "too far" seems to mean simply that the lawmakers must not try to regulate all business at once, while "too fast" indicates only that some apparent, although not necessarily real, limitations on administrative discretion must be found in the statute.

If these conclusions are correct they raise the question as to whether the doctrine that delegated powers may not be redelegated has any significance in modern constitutional law. Never literally true, it appears that the maxim is no longer even substantially accurate. Practical necessity seems the only limitation left as far as delegability is concerned. It is not true, as long as the *Schechter* and *Panama* cases are not overruled, that there are no limitations whatever, but such limitations as remain are determined by the rule of reason rather than the doctrine of non-delegability. Thus the power of the legislature is limited here, as in other respects, by the vague boundaries of due process. "*Delegata potestas non potest delegare*" has been swallowed by the fifth and fourteenth amendments. The question is not, "May powers be delegated?" but "Is it reasonable to make this particular delegation in this specific case?" In determining the question the character of the field, the type of administrative agency and the need for regulation are all relevant. If Congress has basic power in the field and if it has been as specific in delegating that power as circumstances permit, then the delegation seemingly will be sustained.

If the constitution is thus construed to permit almost unlimited delegation, it is apparent that relief from arbitrary administrative action must come almost entirely from procedural limitations. It is here that the truly significant issues of administrative law arise. Devices must be created which will insure a proper respect for individual interests and which will subject administrative agencies to the rule of law. Granting the inevitable widespread use of the administrative process, it must not be employed with complete disregard of the fundamental notions of fair play. Increasingly apparent is the fact that many reforms must be adopted if the tendency toward absolutism is to be held in check.¹²²

¹²²See Pound, *For the "Minority Report"* (1941) 27 A. B. A. J. 664.

ADDENDUM

After the foregoing article was in press, the Emergency Price Control Act of 1942¹²³ was enacted by Congress and approved by the President. Although the delegations contained in the measure are not particularly novel the importance of the law makes some notice of them appropriate. In the main, Congress has adopted the now familiar technique of setting out a broad declaration of policy and granting the administrator power to effecuate the purposes of the act.¹²⁴ Additional guides are included with reference to various activities. Thus, in price fixing, the administrator is to give "due" consideration "as far as practicable" to prices prevailing between October 1, and October 15, 1941.¹²⁵ With respect to agricultural commodities, his discretion is much more rigidly limited.¹²⁶ In price fixing generally, consultation with industry committees is provided for,¹²⁷ and to some extent formal fact-finding is required.¹²⁸

There is no reason to doubt the constitutionality of the law from the delegation standpoint. The observances of formal restrictions of the sort previously noted, the practical impossibility of greater limitation of discretion, and above all the importance of the measure as a device to aid the war effort, combine to make its approval by the Supreme Court a virtual certainty.

¹²³Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942).

¹²⁴*Id.* §§ 1(a); 2(a); 2(b); 2(d), and in numerous portions of the act.

¹²⁵*Id.* § 2(2). A similar provision is found in regard to rents. *Id.* § 2(b).

¹²⁶*Id.* § 3(a).

¹²⁷*Id.* § 2(a).

¹²⁸*Ibid.*

THE ADMINISTRATIVE PROCESS OF FIXING WAGES UNDER THE FAIR LABOR STANDARDS ACT OF 1938* (LA)

Arthur J. Riggs†

I. INTRODUCTION¹

This article will concern itself with the administrative method of determining minimum wage rates under the Fair Labor Standards Act of 1938.² The Act is now some three and a half years old and so the wage fixing procedures have reached an advanced stage of maturity. Changes in Administrative technique may occur, but these will probably be of a minor nature.³

Section 5 and 8 of the Statute are the ones which are germane to our problem.⁴ These provide in substance that the Administrator

*Statements of opinion expressed herein are those of the writer and not necessarily those of the United States Department of Labor.

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¹For a general discussion of the subject see ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES* [SEN. DOC. NO. 10, 77th Cong., 1st Sess. (1941)] pt. 1, pp. 5-47. This collection of monographs first appeared in mimeographed form. The relevant portion of this subject appeared as Monograph No. 12, entitled *Administration of the Fair Labor Standards Act of 1938*, pp. 10-99. This discussion will hereafter be designated merely as ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH. Page citations herein will be to the final printed form; page citations in the mimeographed form are roughly double the number of the printed page citations.

Other general discussions of the topic include: Golding, *The Industry Committee Provisions of the Fair Labor Standards Act* (1941) 50 YALE L. J. 1141; Dickinson, *The Organization and Functioning of Industry Committee Under the Fair Labor Standards Act* (1939) 6 LAW & CONTEMP. PROB. 353; Note, *Fair Hearing Before the Wage and Hour Division* (1941) 10 GEO. WASH. L. REV. 219; Note, *Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 ILL. L. REV. 840.

²52 STAT. 1060-1069; 29 U. S. C. A. §§ 201, 219 (Supp. 1941).

³Under a recent Executive Order the greater part of the Division has been moved to New York City. There has been an alarming loss of experienced personnel as a result of this shift. The Act is also under fire in Congress at the present time.

⁴"Sec. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

"(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

"(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, steno-

I Standards
II Admin. Law
III Evidence
IV Procedure

of the Wage and Hour Division shall appoint an industry committee for each industry with a view to reaching a minimum wage of 40 cents an

graphic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

"(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

"(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands." 52 STAT. 1062 (1938), as amended in 54 STAT. 615 (1941), 29 U. S. C. A. § 205 (Supp. 1941).

"Sec. 3 (d) No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands." 54 STAT. 616 (1940).

"Sec. 8 (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

"(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employ-

hour as soon as is practicable under the limitations of the Act.⁵ The committees are to investigate conditions in the various industries and fix the highest minimum wage rates (not in excess of 40 cents an hour) which they determine will not substantially curtail employment in the

ment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classifications shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

"(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

"(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

"(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons." 52 STAT. 1064 (1938), 29 U. S. C. A. § 208 (Supp. 1941).

⁵52 STAT. 1062, 1064 (1938), 29 U. S. C. A. §§ 205(a), 208(a) (Supp. 1941).

The Act became effective Oct. 24, 1938. Under section 6(a) the basic minimum wage was fixed at 25 cents an hour during the first year for all industries engaged in commerce or in the production of goods for commerce. From Oct. 24, 1939 to Oct. 24, 1945, the basic minimum is 30 cents an hour, although the rate may be raised as high as 40 cents an hour by the administrative procedure outlined in sections 5 and 8. In 1945 the basic rate will automatically become 40 cents an hour and the wage fixing provisions of the Act will become inoperative except insofar as it is necessary to lower the rate below the basic minimum—but not below 30 cents an hour—in accordance with section 8(e).

particular industry which each is examining.⁶ Under section 8(c) the committees are given the power to create classifications in accordance with broad statutory standards. After a committee has agreed upon a rate and has transmitted its advisory finding to the Administrator, he holds a hearing upon the recommendation to determine whether or not the suggested minimum should be approved or disapproved. If approved, a wage order will issue which embodies the recommended rates, and in any case the Administrator will issue his findings and opinion.⁷

It thus appears that there are, roughly speaking, four major steps in the process of formulating a wage order: (1) The determination of the industries to be considered and the definition of the industries; (2) The appointment of industry committees; (3) The committee hearings and recommendations; (4) The Administrator's hearings and determinations.

The statutory scheme constitutes a miniature government designed to deal with the limited problem of minimum wages in low wage industries and is characterized by a system of checks and balances comparable to the republican form of government embodied in the United States Constitution.⁸ The industry committee is the legislative branch of the "government," the Administrator is the executive branch⁹ although he has certain juristic duties, and the circuit courts and the United States Supreme Court make up the judicial branch.¹⁰ Variations from the indicated functions exist (the most noteworthy being that action must initiate with the Administrator), but these are of the same nature as the overlapping so apparent in our present government,¹¹ and so inevitable because of the impracticality of a rigid application of the doctrine of the separation of powers. Criticism of the procedure pursued is really criticism of the

⁶52 STAT. 1064 (1938), 29 U. S. C. A. §§ 208(a), 208(b) (Supp. 1941).

⁷52 STAT. 1064 (1938); 29 U. S. C. A. § 208(d) (Supp. 1941).

⁸The history of the Act is too lengthy to be discussed in this article—for general discussion see Forsythe, *Legislative History of the Fair Labor Standards Act* (1939) 6 LAW & CONTEMP. PROB. 464. Few pieces of legislation have had a more checkered career. During the course of 13 months Congress considered 10 bills embodying no less than five different approaches to the minimum wage problem, *supra* note 4. These ranged from provision for fixed standards with no administrative machinery [see 82 CONG. REC. 1591 (1937)] to provision for the fixing of minimum wages and maximum hours—unchecked by statutory limits—by an administrative board (see original bill of May 24, 1937; S. 2475, H. R. 7200, 75th Congress).

⁹In this regard, note the President's veto power. This is a legislative rather than an executive power (although it often smacks of that unique type of legislative authority known as judicial review), since it does not implement, but controls the legislative will.

¹⁰Provision for judicial review in the circuit courts is made in section 10(a) of the Act. Action must be brought within 60 days of the entry of the order. To date only the apparel, textile, railroad and jewelry orders have been attacked.

¹¹The Chief Executive is now responsible for the initiation of nearly all important legislation.

democratic form of government as it exists in the United States today. It possesses in large part the same weakness and the same strengths.

The system of checks and balances has been carried over into the administrative machinery which has been erected to implement the Act. There are three divisions under the Administrator which are concerned with wage order procedure.¹² The first of these is the Industry Committee Branch; this section is composed of persons of practical business experience. The second of the divisions is the Research and Statistics Branch; this section is made up of economists. The third division is the Review Unit of the Solicitor's Office of the Department of Labor; this is the legal branch. It will be seen, therefore, that the legal, the so-called practical business and the economic viewpoints are segregated one from the other. The Administrator is the synthesizing agent, and it is his responsibility to make sure that the diverse opinions are seen in proper perspective.

II. WAGE ORDER PROCEDURE

1. *Determination of the Industries to be Considered and the Definition of These Industries*¹³

Because the flexible wage fixing provisions of the Act have, for all intents and purposes, a very limited life expectancy¹⁴ and since the

¹²There is also an information branch which has as one of its duties the issuing of notices and the handling of publicity in connection with wage order proceedings. For a delineation of the Wage and Hour Division: see WAGE AND HOUR DIVISION, ANNUAL REPORT (1940) 141-148. The Industry Committee Counsel section mentioned at page 143 has been eliminated.

¹³The Administrator has issued wage orders in the following industries: Textile; Apparel (the original apparel definition has been split up and new committees have been convened on almost all branches of the industry which did not reach 40 cents an hour under the original order); Gray Iron Jobbing Foundry; Embroideries; Jewelry; Luggage and Leather Goods; Drugs, Medicines and Toilet Preparations; Rubber Products Manufacturing; Converted Paper Products; Railroad Carriers; Shoe Manufacturing and Allied Industries; Hosiery; Hats; Millinery; Carpets and Rugs; Portable Lamp and Shade; Enameled Utensil; Clay Products; Knitted and Men's Woven Underwear and Commercial Knitting; Wood Furniture Manufacturing; Lumber and Timber Products; Knitted Outerwear; Passenger Motor Carrier; Property Motor Carrier; Woolen; Pulp and Primary Paper; and Leather. Wage orders have also been issued for Puerto Rican industries.

It is to be noted that in cases where the original recommendation does not reach 40 cents it is the Division's policy to convene another committee for reconsideration of the matter after the industry has had some opportunity to adjust itself to the original rate. Thus, no less than three committees have been convened for the Textile Industry; two have met for the Woolen, Knitted Outerwear, Shoe Manufacturing, Knitted and Men's Woven Underwear, and others.

The Division is just now beginning to deal with agricultural commodities—a committee is in prospect for grain products: recommendations have been made in the cigar and tobacco industries.

¹⁴52 STAT. 1062, 1064 (1940); 29 U. S. C. A. §§ 205(a), 208(a) (Supp. 1941).

method of action outlined is expensive,¹⁵ the Administrator is faced with the preliminary problem of what industries to consider.¹⁶ The statutory mandate is to fix the highest minimum wage between 30 and 40 cents an hour which will not substantially curtail employment in the industry, and so those industries are picked whose wage structures show that a substantial rise in the minimum will benefit a large number of employees without causing a considerable contraction of the labor force.¹⁷ Availability of data, the degree and type of government control, the nature of the operations normally carried on by various competing groups are some of the other factors to be taken into account.¹⁸ The industries to be examined are often brought to the Administrator's attention by labor unions or trade associations, but actual groundwork to ascertain whether or not an industry is acceptable is carried out by the Industry Committee Branch with some cooperation from the Research and Statistics Branch and the Review Unit. In short, the initial decision rests with the practical business viewpoint subject only to review by legal and economic experts. This treatment seems correct in view of the fact that problems of policy predominate in the early stages.¹⁹

The next step is the drawing of the definition.²⁰ It has been suggested that the high cost of wage determination, coupled with the possibility of classification provided by the Act and the wish to reach a 40 cent minimum as soon as is feasible under the Statute, creates a tendency

¹⁵Note, *Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 ILL. L. REV. 840, 841 alleges that the minimum cost per committee is \$20,000. This is undoubtedly an overstatement when applied to committees which have been called to reconsider an industry previously dealt with.

¹⁶The Administrator has complete control of the order in which industries are to be examined. See section 5(a) of the Act.

¹⁷WAGE AND HOUR DIVISION, ANNUAL REPORT (1940) 110.

¹⁸See 1 Wage Hour Rep. 141, 142; ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 5-7.

¹⁹"[In making the definition] the Division almost always runs into strong sentiment for the segregation and treatment of certain groups separate from their allied and overlapping groups. This is easy to understand. Certain competitive jealousies and antagonisms have developed between branches of industry, and each group naturally prefers to deal with its own problems.

"Committees for related industries in broad industrial groups have been appointed together, or have followed each other closely, in order that problems of overlap and competition may be properly coordinated." WAGE AND HOUR DIVISION, ANNUAL REPORT (1940) 111.

²⁰Note that section 3(h) of the Act defines industry to mean "A trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed."

toward sweeping coverage.²¹ This tendency may be tempered to some extent by the desirability of having committees of a workable size,²² and by the problem, where numerous classifications are possible, of whether or not the Administrator can accept part of a recommendation and reject the rest.²³

A second great problem in defining an industry is closely related to the question of the proper scope of coverage discussed immediately above. It is the problem of the clean cut segregation of industries. This ideal is almost impossible of attainment; some factories, and especially those with integrated operations,²⁴ must operate under two or more minimum rates.²⁵ It speaks well for the Division's ingenuity that it has been very

²¹Golding, *The Industry Committee Provisions of the Fair Labor Standards Act* (1941) 50 YALE L. J. 1141, 1151-1153; ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH pp. 7-12. The Division has profited much by the experience of the N. R. A. codes.

²²The Apparel Committee had 48; the first Textile Committee had 21; the first Shoe Committee had 27; and the first Knitted Underwear Committee had 24 members. The usual size is from twelve to fifteen members, and the large membership of the Apparel Committee is accounted for by the wide scope of the industry.

²³Section 8(d) of the Act provides that the Administrator "shall by order approve" or "shall disapprove" the committee's "recommendations." The use of the plural of the word "recommendation" has lead some to argue that the Administrator must accept or reject the proposals *in toto* and cannot exercise an "item veto." This position is not sound. Section 8(a) states that the committee "shall from time to time recommend the minimum rate or rates . . . in such industry or classifications therein." This shows that the recommendations need not be contemporaneous, and indicates that classifications are not, necessarily at least, interdependent. Section 10(a) permits a person aggrieved by a wage order to petition the circuit court to have it set aside "in whole or in part, so far as it is applicable to petitioner." If the reviewing court has power to reject part of a recommendation, clearly the Administrator, who in some aspects resembles a court of first instance, has a like power. Furthermore, since the power of definition rests with the Administrator, it would be highly formalistic to hold that the sustaining of the wage order depends upon whether or not the industry is split up by definition or by classification. This view was affirmed in *Southern Garment Manufacturers v. Fleming*, 122 F.(2d) 622, 628-631 (App. D. C. 1941) as to all cases in which the partial rejection of the recommendations did not affect the competitive interrelationship of the segments composing the industry.

²⁴Examples of this are to be found in those hat factories, shoe factories and hosiery factories which make their own boxes, packing cases and the like.

²⁵The hardship is usually not extreme, for the amount of labor time spent on various articles by each employee can often be segregated. However, where the time is non-segregable, the highest applicable minimum must be paid (CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 516). This means, in effect, that all clerical and maintenance employees are covered by the highest minimum. Such employees are considered to be engaged in producing goods for commerce and so are subject to the Act. See *Wage and Hour Division Interpretative Bulletin No. 1* ¶ 5; *Fleming v. Arsenal Building Corp.*, 5 Wage Hour Rep. 8 (C. C. A. 2nd, 1941); *Fleming v. Kirschbaum Co.*, 4 Wage Hour Rep. 717 (C. C. A. 3rd, 1941).

successful in eliminating serious overlaps.²⁶ The principal trouble has come in those definitions such as that for the rubber industry,²⁷ which are delimited by an ingredient rather than by a product.²⁸

The definition is drawn up by the Industry Committee Branch after conferences with persons acquainted with the industry, a study of wage data, and sometimes after extensive field trips. A tentative draft is then submitted to the Research and Statistics Branch and to the Review Section for suggestions.²⁹ Again the practical business viewpoint has

²⁶Cf. Golding, *The Industry Committee Provisions of the Fair Labor Standards Act* (1941) 50 YALE L. J. 1141, 1153-1154. "The Administrator has adopted the view that a plant will be included in the X Industry if its machinery might be employed to produce products of the X Industry." This statement is incorrect. The line of demarcation is solely upon the type of goods produced unless the definition indicates specifically to the contrary; as it does only in the case of the Woolen and Textile industries.

²⁷CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 601 § 601.4 reads in part: "The Rubber Products Manufacturing Industry . . . is defined as follows: The manufacture of all products which have as an ingredient any form of [rubber] . . ." By administrative rulings this definition has been narrowed to include only those products having rubber as a "substantial" ingredient. Otherwise every industry using rubber washers or cushions would have been subject to the order. Similar examples of post-hearing administrative clarification are not infrequent.

²⁸The ingredient type of definition has often covered small economic units not specifically considered at the time that the definition was being formulated, but both types of definitions have done this to some extent. The Administrator will not interpret an operation to be within the coverage of a wage order where such coverage is not intended. Otherwise the operation will be covered where the segment not covered does not constitute a separate industry and where it can in consequence, be logically held that in considering data relative to the industry as a whole, the committee and the Administrator dealt with the problems of the segment.

²⁹CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 511, § 511.17 provides that "an industry committee may, at any time, recommend to the Administrator that the scope of the industry as defined in the order appointing the committee be enlarged, modified, or restricted." This indicates that the Administrator is willing to have advice upon the definitional issue, but the fact remains that the Administrator alone has the power to define an industry. In the case of the textile and wool industries the Administrator asked for the committee's advice as to the proper line of cleavage between the two. The loss of time occasioned by distracting the committee's attention with the definitional issue has led to an abandonment of this practice, although modifications of the definition at least up to the time of the making of the recommendation are clearly permissible as long as the recommendation is made with regard to the final definition. *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U. S. 126, 148, 149, 61 Sup. Ct. 524, 85 L. ed. 624 (1941). Suggestion has been made (ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, p. 11) that pre-committee conference with members of industry be held on the question of definition, but the Division has not found the device very useful. That is not to say that members of various industries are not consulted; "Before establishing a final definition for industry committee purposes the Division makes it a point to send its investigators into plants and to discuss the problems with representatives of trade associations and unions in the industry." WAGE AND HOUR DIVISION, ANNUAL REP. (1940) 111.

the initiative, although here it is subject to more rigorous checks than before. The essential soundness of this method of formulating the definition is shown by the relatively minor changes which have been necessary in industries which have been reconsidered following the establishment of a rate lower than 40 cents.³⁰

2. *The Appointment of Industry Committees*³¹

Section 5(b) of the Act provides that an industry committee shall contain a number of *disinterested* persons representing the *public* (one of whom shall be designated as chairman), a like number of persons representing *employers* in the industry and a like number of persons representing *employees* in the industry. In the appointment of each group the

³⁰One of the most controversial legal questions arising under the Act is as to whether an industry definition is subject to judicial review. The sole case bearing directly upon this point is *National Ass'n of Wool Manufacturers v. Fleming*, 122 F.(2d) 617 (App. D. C. 1941). The issue there presented was as to whether in dealing with the question of wool mixtures the Administrator had acted properly in placing the dividing line between the wool and textile definitions at a certain per cent of wool by weight. The Administrator contended that the propriety of the definition could not be attacked, and cited *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U. S. 126, 148-150, 61 Sup. Ct. 524, 85 L. ed. 624 (1941), where the Supreme Court stated that the inclusion of a product in one industry or another, where both are subject to the Act, principally concerns convenience in administering the Act. The court of appeals was not impressed by this argument, and while it unanimously upheld the reasonableness of the Administrator's action, a majority declared that the definition was open to judicial review. The prevailing judges reasoned that section 10(a) provided for judicial inspection of orders issued under the Act and since the definition is an integral part of a wage order it too is subject to review. *Accord*: ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, p. 10. The writer takes no position upon this point, but indicates the recent case of *Gray v. Powell*, 312 U. S. 666, 62 Sup. Ct. 326, 86 L. ed. 285 (1941), which seems to stand for the general proposition that rulings on questions of mixed law and fact which have been entrusted to an agency for decision are not judicially reviewable except in so far as comparable Congressional action would be. In any case, the presumption in favor of the legality of the Administrator's actions and the fact that the question to be determined is merely whether the definition is reasonable and not whether it is the best one possible, make it extremely unlikely that any court would upset a definition unless gross competitive discrimination is revealed. *Cf.* *Columbus and Greenville Ry. v. Administrator*, C. C. A. 5th, Feb. 28, 1942.

³¹*See* 1 *Wage Hour Rep.* 141, 142; *Note, Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 *ILL. L. REV.* 840, 843; ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 12, 13; Dickinson, *The Organization and Functioning of Industry Committees Under the Fair Labor Standards Act* (1939) 6 *LAW & CONTEMP. PROB.* 353, 356; Golding, *The Industry Committee Provisions of the Fair Labor Standards Act* (1941) 50 *YALE L. J.* 1141, 1157-1161.

Administrator must give "*due regard*" to the geographical regions in which the industry is carried on.³²

Topic The four problems of selection are (1) to obtain members who are both intelligent and open-minded, (2) to obtain disinterested public members, (3) to give "*due regard*" to the industry's geographical distribution, and (4) to give adequate representation to all representative groups within the industry.

The first problem calls for tact and insight into human nature; the Division has been amazingly successful in picking harmonious committees. Employer members are generally picked from lists submitted by trade associations and labor representatives from union suggestions;³³ the Division generally assumes the task of finding the public members.³⁴

The second problem presents few difficulties—the teaching profession and the retailing branches of the various industries provide the most fertile field for the selection of public members.³⁵ The third problem is also capable of fairly easy solution because the words "*due regard*" have a tradition of broad legal meaning³⁶ which the *Opp* case has affirmed with specific regard to this Act.³⁷

The problem of industry representation is the most difficult both from the standpoint of law and policy. As defined, each industry is generally composed of a number of fairly distinct units. If all were to have an employer representative, the committee would be much too

³²It would appear that the provision that the committee shall be appointed "without regard to any other provisions of law regarding the employment and compensation of employees of the United States" exempts Federal employees from the law against double compensation. 39 STAT. 120 (1916), 39 STAT. 582 (1916), 5 U. S. C. A. § 58 (1927), 19 Dec. U. S. Compt. Gen. (1940) 926, 930.

³³WAGE AND HOUR DIVISION, ANNUAL REPORT (1940) 109.

³⁴The public members of the hosiery committee were chosen from joint recommendations of trade and union sources.

³⁵"Of the first 94 public members, 48 were educators, 17 business executives, 8 lawyers, 6 newspaper executives, 4 representatives of industrial organizations, 3 representatives of consumer organizations, 3 social workers, 3 judges, and 2 engineers." WAGE AND HOUR DIVISION, ANNUAL REPORT (1940) 109.

³⁶See *United States v. Interstate Commerce Comm.*, 88 F.(2d) 780, 783 (App. D. C. 1937); *Ralston Steel Car Co. v. Commissioner of Interstate Revenue*, 53 F.(2d) 948, 950 (C. C. A. 6th, 1931).

³⁷*Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U. S. 126, 151, 61 Sup. Ct. 524, 85 L. ed. 624 (1941) *aff'g* 111 F.(2d) 23, 26 (C. C. A. 5th, 1940). Here the South had 4 employer members, 3 public members and 2 employee members (2 other employee members were from Washington, D. C.). This meant that the South, producing 51.5 per cent of the value of the product and employing 55 per cent of the labor in the textile industry, had only 9 members out of the 21. The court stated that the statute did not require mathematical geographical apportionment of the committee so long as there was fair representation. For general discussion of this case, see Fuchs, *Constitutional Implications of the Opp Cotton Mills Case With Respect to Procedure and Judicial Review in Administrative Rule-Making* (1941) 27 WASH. U. L. Q. 1.

large. The solution has been to hold that it is sufficient if an industrial segment is represented on the committee by persons having similar wage structure.³⁸ The legality of this view seems beyond question and it was fully upheld in *Andree & Seedman v. The Administrator*,³⁹ where the court stated that it was not essential to the validity of the apparel wage order that all branches of the industry have direct representation.⁴⁰

The makeup of the committee has been criticized on the ground that unorganized labor does not have direct representation.⁴¹ It is, of course, true that direct representation of unorganized labor is almost impossible, and so this group must largely depend upon public and labor members for the presentation of its case. But the whole body of labor is considered in the wage data provided by the Wage and Hour Division, and as no appreciable decline in employment appears to have resulted from any of the wage orders yet issued, it would seem that the criticisms leveled at this partial failure of representation are academic.

Responsibility for the selection of committee members again rests almost entirely with the Industry Committee Branch and the relatively slight amount of adverse comment that has been heard is proof of the wisdom of delegating this function to a business-minded non-professional group.

3. *The Committee Hearings and Recommendations*

An industry committee's principal duty is to fix the highest minimum wage rate not in excess of 40 cents an hour which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.⁴² Correlative with this is an inquiry into the necessity for classifying the industry in accordance with standards set forth in section 8(c) of the Act.⁴³ Suggestions concerning such things as the elimination of home work, the liberalizing of learner and apprentice regulations and the date upon which the wage order should go into effect are sometimes sent to the Administrator, but he is in no way bound to consider them; the sole function of an industry committee is to fix minimum wages.

³⁸1 Wage Hour Rep. 141, 142. The necessity of securing industry's confidence often leads to a modification of this principle.

³⁹122 F.(2d) 364 (App. D. C. 1941).

⁴⁰*Id.* at 636. "We outgrew the town hall a decade or so ago There is no showing that these 16 committee members did not regard or conduct themselves as representatives of the whole group."

⁴¹Dickinson, *The Organization and Functioning of Industry Committees Under the Fair Labor Standards Act* (1939) 6 LAW & CONTEMP. PROB. 353, 364.

⁴²52 STAT. 1064 (1938), 29 U. S. C. A. § 208(b) (Supp. 1941).

⁴³See note 29, *supra*, where the committee's connection with the definitional issue is described.

There is nothing in the Act that requires the committee to hold a hearing or to give notice of its meetings. The provision in section 8(d) that the Administrator find that the committee's recommendations "are supported by the evidence adduced at the hearing" clearly refers to the Administrator's hearing, since the only direction to industry committees is that they "investigate conditions in the industry."⁴⁴ However, the committees are generally willing to listen to persons having a legitimate interest in the proceedings, and in some instances they have elected to hold public hearings,⁴⁵ in which case, full notice of such hearing is given.⁴⁶

Evidence
The procedure followed is much the same whether or not there is a public hearing. Economic data bearing upon the industry and prepared by various branches of the Bureau of Labor Statistics of the Department of Labor and by the Research and Statistics Branch of the Wage and Hour Division are submitted to the committee.⁴⁷ Witnesses representing both industry and labor usually appear and give testimony.⁴⁸ The chairman permits committee members to cross examine the witnesses and may in his discretion accept questions from the floor. If it wishes, the committee may request additional information,⁴⁹ and subcommittees may be

⁴⁴The proceedings before an industry committee are not open to judicial review [*Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division*, 312 U. S. 126, 146, 61 Sup. Ct. 524, 85 L. ed. 624 (1941) *aff'g* 111 F.(2d) 23, 26 (C. C. A. 5th, 1940)]; see also *Andree & Seedman v. Administrator*, 122 F.(2d) 634, 637 (App. D. C. 1941); Note, *Fair Hearing Before the Wage and Hour Division* (1941) 10 GEO. WASH. L. REV. 219, 221-222. Sec. 10(a) merely provides for review of the Administrator's orders. It thus would appear that the statutory standards as applied to industry committees are merely directive and are inserted solely with a view to guiding the committee's investigations along the lines which must be pursued by the Administrator in his hearing on the legal sustainability of the recommendations. This conclusion is borne out by the language of section 8(e) which, in dealing with the lowering of rates below 40 cents an hour after 1945, provides that the industry committee and the Administrator must both find by a preponderance of the evidence that the order is necessary to prevent substantial curtailment of employment. No comparable provision is to be found in those divisions of the statute dealing with wage raising, and section 10(a) merely requires that the Administrator's order be supported by substantial evidence. Cf. section 8(d) where the Administrator is directed to take into consideration the same factors as "are required to be considered by the industry committee."

⁴⁵Notably in the case of the railroad carrier hearing which consumed 19 days. See CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 511, § 511.11.

⁴⁶In practice notice of non-public committee meetings is given by press release and by publication in the Federal Register, but more care to give personal notice is taken in the case of a public hearing. See ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 15-16.

⁴⁷Wherever possible this material is sent to the members before the committee meets, so that they will have some chance to assimilate it.

⁴⁸This testimony is not under oath.

⁴⁹Under section 9 of the Act [52 STAT. 1065 (1938), 29 U. S. C. A. § 209 (Supp. 1941)], and CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 511, § 511.13, the subpoena powers of sections 9 and 10 of the Federal Trade Commission Act of September 26, as amended, 38 STAT. 722-723 (1914), 15 U. S. C. A. §§ 49-50. (Supp. 1941), are available to the committees.

appointed to gather information on various subsidiary points.⁵⁰ During this phase of the proceedings a verbatim transcript is kept, but following the accumulation of data the committee generally goes into executive session. No record of what is said in this session is preserved, although a journal of relevant proceedings is maintained, and everyone except members of the committee and of the Wage and Hour staff is barred from the room. This permits the free interchange of ideas and information among the committee members and does away with the reserve occasioned by publicity.⁵¹

The committee's final obligation is to transmit its recommendations to the Administrator together with its reasons for the same.⁵² It was the original practice to draw up elaborate findings of fact, and a special subcommittee was sometimes delegated to compose the report; today these reports are little more than recommendations supported by conclusions of fact and law.

During committee proceedings the Wage and Hour Division plays a passive role. The Research and Statistics Branch has in conjunction with the Bureau of Labor Statistics prepared an analysis covering wage structure, living, production and transportation costs and other relevant economic matter.⁵³ An economist from this section is therefore present to explain these reports. A lawyer from the Review Unit is also in attendance to aid the members with any legal questions which may arise and to give advice concerning the technical aspects of the drafting of motions and the report and recommendation.⁵⁴ An industrial expert from the Industry Committee Branch is present to service the committee.

The committee's office is legislative in nature rather than purely advisory.⁵⁵ It alone can initiate and determine the rates to be consid-

Funding & Committee

⁵⁰CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 511, § 511.2 provides: "The chairman of the industry committee may appoint authorized subcommittees of one or more persons from among the membership of the committee, provided however, that the industry committee may, by a vote of not less than a majority of all its members, adopt a different procedure for the appointment of authorized subcommittees."

A subcommittee, as a creature of the industry committee, has no statutory basis for existence, and hence is not subject to the geographical and other limitations set forth in the statute. *Andree & Seedman v. Administrator*, 122 F.(2d) 634, 635 (App. D. C. 1941).

⁵¹Note in this connection that CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 511, § 511.14 declares that all proceedings before an industry committee except those at a public hearing are confidential in nature.

⁵²Section 8(d) of the Act [52 STAT. 1064 (1938)], 29 U. S. C. A. § 208(d) (Supp. 1941)] declares that the committee shall file "a report containing its recommendations with respect to the matters referred to it" with the Administrator. See also CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 511, § 511.19.

⁵³This report is cleared through the Industry Committee Branch and the Review Unit, but the final responsibility for its contents rests with the economists.

⁵⁴Under former practice this function was performed by lawyers of a separate Industry Committee Counsel Section.

⁵⁵See ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 18-20.

ered by the Administrator. That officer may veto or accept the recommendations, but he cannot modify them to suit his own wishes.

The representative nature of the deliberative group and the liberal hearing practice pursued assure democratic treatment, and although it has been said that committees proceed slowly,⁵⁶ at the present time deliberations rarely consume more than two or three days.⁵⁷ The most serious objections that have been voiced against committee procedure have been that the members do not methodically and open-mindedly consider the elements stressed in the Act, but rather make their recommendations on the basis of collective bargaining between employer and labor representatives with the public members acting as referees.⁵⁸

This overstates the thesis. So as to be able to present their case most effectively, most members, even though biased, study the data carefully and make a conscientious effort to fit the recommendation to the statutory standards. Furthermore, it is no reproach to say that wage recommendations are in many instances the result of compromise rather than of open-minded deliberation. When it set up a body in which two-thirds of the members were avowedly partisan, Congress certainly was not so naive as to assume that disinterested consideration of statutory standards would be the sole or even the main guide to wage determinations.⁵⁹

Congress was fully aware that its own members often espouse the views of various groups of constituents rather than that abstract concept known as "the good of the people as a whole." Indeed partisan representation and the compromise arising from the clash of conflicting interests is the essence of democratic government as practiced in the United States today. It is, or may be, a relatively slow process, but all views are presented and a solution more or less acceptable to all is hammered out. Conformance of the result to certain basic requirements is assured by

⁵⁶Shiskin, *Wage Hour Law Administration from Labor's Viewpoint* (1939) 29 AM. LAB. LEG. REV. 63, 64.

⁵⁷CODE OF FEDERAL REGULATIONS, tit. 29, c. 5, pt. 511, § 511.21 makes provision for the dissolution of committees in case of unreasonable delay or incapacity to arrive at a result.

⁵⁸Shiskin, *supra* note 56; cf. ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 18-20 and Note, *Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 ILL. L. REV. 840, 849.

⁵⁹"This carefully devised procedure [enunciated in the Act] has a double advantage. It insures on the one hand that no minimum wage rate will be put into effect by administrative action that has not been carefully worked out by a committee drawn principally from the industry itself and on the other hand that no minimum wage rate will be put into effect by administrative action which has not been found by an administrative official of the Government, exercising an independent judgment on the evidence, and responsible to Congress for his acts, to be in accordance with law." H. R. REP. NO. 2738, 75th Cong., 3rd Sess. (1938) 31.

provision for review by some unconnected unit or units; the reviewing units in the case of the Fair Labor Standards Act being the courts and the Administrator.

4. *The Administrator's Hearings and Determinations*⁶⁰

Upon the filing of the report and recommendation the Administrator causes notification of a hearing thereon to be given by press release; by publication of official notice in the Federal Register; and by personal notice sent to all known interested parties.⁶¹

Since we have seen⁶² that industry committee conduct is not open to judicial scrutiny, the success or failure of a wage order before the court depends wholly on the record made at the Administrator's hearings. Evidence on economic and competitive conditions in the industry under consideration⁶³ must be introduced to show that the recommendations will not cause substantial curtailment of employment in the industry,⁶⁴

⁶⁰See on this general topic: Note, *Fair Hearing Before the Wage and Hour Division* (1941) 10 GEO. WASH. L. REV. 219, 222-224; ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 21-47; Note, *Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 ILL. L. REV. 840.

⁶¹52 STAT. 1064 (1938), 29 U. S. C. A. § 208(g) (Supp. 1941) provides that "due notice of any hearing . . . shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested parties." See also subsection (d).

Various sources provide the Division with extensive mailing lists.

⁶²See note 44 *supra*.

⁶³Although in *Andree & Seedman v. Administrator*, 122 F.(2d) 634, 637 (App. D. C. 1941) it was remarked that the statute requires a consideration of, and findings on, the economic, competitive, and employment factors, this is not at most *dictum* and bad *dictum* at that. Sec. 8(b) directs the committee to recommend the highest minimum wage rates ". . . which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment . . ." From the clear grammatical construction it would seem that the test is whether or not, in the light of economic and competitive conditions, the rate will cause appreciable diminution of employment in the industry. The economic feasibility of the rate need not be considered apart from its relation to curtailment of employment. The correctness of this result is borne out by the legislative history. Cf. sec. 8(b), conference committee print of June 11, 1938 with the corresponding section of conference committee print No. 2 of June 12, 1938. *Accord*: *Columbus & Greenville Ry. v. Administrator*, C. C. A. 5th, Feb. 28, 1942.

⁶⁴"Substantially curtail employment in the industry" literally means what it says. The Congressional debates make it clear that unemployment in the industry as a whole, and not in individual units, is to be considered. Senator Black stated: "[The Fair Labor Standards Board of the original bill] would not have the power to fix one wage scale for one unit of industry and another wage scale for another unit of industry because there are tens of thousands of such units. . . ." 81 CONG. REC. 7662 (1937). Mrs. Norton in presenting the bill in final form took care to interpolate: ". . . [B]y industries I do not mean individual employers but, on the contrary, industries in the national sense." 83 CONG. REC. 9256 (1938). See *Southern Garment Manufacturers Ass'n v. Fleming*, 122 F.(2d) 622, 633 (App. D. C. 1941): also Note, *Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 ILL. L. REV. 840, 845. The debates also make it clear that the expression "substantially curtail employment" contemplates some dislocation in the industry. As Congressman Celler pointed out: "[The bill] will create dislocation in some industries. It will mean severe jolts in certain sections. It will cause difficulties in some plants.

as must also evidence on the necessity for classification of the industry.⁶⁵ The statute states that for the findings of fact to be conclusive, the supporting evidence must be substantial.⁶⁶ However, in making his determinations upon the basis of the various statutory criteria, the Ad-

That is unfortunate. You cannot satisfy all factions and all sections." 82 CONG. REC. 1486-1489 (1937). See also *Columbus & Greenville Ry. v. Administrator*, C. C. A. 5th, Feb. 28, 1942.

⁶⁵"(c) The Industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

"No classification shall be made under this section on the basis of age or sex." 52 STAT. 1064 (1938), 29 U. S. C. A. § 208(c) (Supp. 1941).

This section is ambiguous and has been much criticized. See Golding, *The Industry Committee Provisions of the Fair Labor Standards Act* (1941) 50 YALE L. J. 1141, 1143-1144, n. 11; Note, *Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 ILL. REV. 840, 846. Since it is clear (note 64 *supra*) that the fundamental test is as to whether there is substantial curtailment of employment in the industry as a whole, and since the mandate of section 8(a) is to reach 40 cents an hour as soon as is economically feasible, it may be argued with great force that the classification provision permits the fixing of rates higher, but not lower, than the general industry level. Note, *Wage Order Procedure Under the Fair Labor Standards Act* (1941) 35 ILL. L. REV. 840, 846; cf. Golding, *The Industry Committee Provisions of the Fair Labor Standards Act* (1941) 50 YALE L. J. 1141, 1144. In rebuttal it can be said that if this is the correct interpretation, the Administrator has the power to lift groups to a higher wage level than would otherwise be permissible by simply including them in a definition containing high wage level groups. Such power is, however, inherent in the power to define industries and control the order of considering them.

The apparent inconsistency between the provision that the rate shall not substantially curtail employment in the classification and the provision that it also shall not give a competitive advantage to any group in the industry, can be resolved by interpreting competitive advantage to mean overall, rather than labor cost advantage.

It is to be noted that some doubt has been expressed as to the legality of occupational differentials, and indeed all classifications to date have been on the basis of groups or divisions within the industry.

⁶⁶52 STAT. 1065 (1938), 29 U. S. C. A. § 210(a) (Supp. 1941). To be "substantial" evidence must be more than rumor. See *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, 230, 59 Sup. Ct. 206, 216, 217, 83 L. ed. 126, 140 (1939); *National Labor Relations Board v. Remington Rand, Inc.*, 94 F.(2d) 862, 873 (C. A. A. 2nd, 1938). Evidence is substantial if "a reasonable mind might accept [it] as adequate to support a conclusion" (*Consolidated Edison Co. v. National Labor Relations Board*, *supra*), or if it is the kind "on which responsible persons are accustomed to rely in serious affairs." (*National Labor Relations Board*

ministrator is at liberty to weigh the factors in any way that he reasonably believes proper.⁶⁷

It must be borne in mind that the duties of the Administrator in his consideration of the committee recommendations are partly quasi-judicial, and partly executive in character. Insofar as he investigates the legal sufficiency of the recommendations he is acting in the capacity of an examiner of legislative action.⁶⁸ Insofar as he acts to implement the recommendations, his functions are executive.

With this background, we will proceed to a study of hearing technique. The Administrator himself generally does not preside at the hearing,⁶⁹ but assigns this task to an examiner.⁷⁰ An attorney from the Review Unit and an economist from the Research and Statistics Branch are assigned to the hearing. Whenever possible, these are the same individuals who considered the definition and the economic report and who attended the industry committee meeting. The industry committee branch under present procedure has no representative, since the sole question for decision is as to whether the recommendations are legally sound and can be supported by economic data.

The presiding officer opens the hearing and the review lawyer then makes a brief statement concerning its legal nature. The attorney puts in evidence the record made before the industry committee together with the various documents connected with the industry committee hearing for the limited purpose of proving the regularity of proceedings. After this, the economist is called⁷¹ as an Administrator's witness; he

Procedure followed

v. Remington Rand, Inc., supra). It is "more than a mere scintilla." The fact that the evidence is hearsay is not determinative of its substantiality. *Opp. Cotton Mills v. Administrator of Wage and Hour Division*, 312 U. S. 126, 155, 61 Sup. Ct. 524, 85 L. ed. 624 (1941).

⁶⁷This is not constitutional as an abandonment of the legislative function. *Opp. Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U. S. 126, 146, 61 Sup. Ct. 524, 85 L. ed. 624 (1941); *see Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 53 Sup. Ct. 350, 77 L. ed. 796 (1932); *United States v. Bush and Co.*, 310 U. S. 371, 60 Sup. Ct. 944, 84 L. ed. 1259 (1940); and especially *United States v. Morgan*, 313 U. S. 409, 417, 61 Sup. Ct. 999, 85 L. ed. 1429 (1941).

⁶⁸There is no question here but that all persons are on notice of the issue before the Administrator. The Government neither supports nor condemns the recommendations. *Cf. Morgan v. United States*, 298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1288 (1936).

⁶⁹Administrator Andrews presided at the Textile hearing.

⁷⁰It is not necessary that the Administrator himself hear the testimony, although in *Morgan v. United States*, 298 U. S. 468, 480, 56 Sup. Ct. 906, 911, 80 L. ed. 1288, 1296 (1936), it is said that "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." It is clear that by "considered" the court did not mean "heard." And indeed, it specifically states that "evidence may be taken by an examiner." *Id.* at 481, 56 Sup. Ct. at 911, 80 L. ed. at 1295. *Accord: Southern Garment Manufacturers Ass'n v. Fleming*, 122 F.(2d) 622, 625-627 (App. D. C. 1941).

⁷¹All witnesses heard at this proceeding are under oath or affirmation.

identifies and describes exhibits dealing with various phases of the industry, and these are then introduced into the record. In case of objection, the presiding officer may rule that persons actually concerned with preparing the exhibits must be summoned.⁷² These witnesses may be cross-examined by persons appearing at the hearing.⁷³ The Administrator's assistants are nonpartisan now and are scrupulously careful to limit their testimony to the giving of facts; no conclusions bearing directly upon the propriety of the recommendations are ventured.⁷⁴

Following the presentation of the Administrator's witnesses, the persons appearing in support of the recommendations are normally heard;⁷⁵ they are followed by those in opposition to them. The witnesses first present their statements, and then submit to cross-examination by the review attorney and others. The privilege of cross-examination has been criticized as being unduly time consuming and of little use in a non-adversary proceeding,⁷⁶ but, as a matter of fact, the reading of numerous transcripts indicates the necessity of probing into the prepared statements of partisan witnesses.⁷⁷ Parties opposed to the views of the deponents are the best ones to indicate flaws in their arguments; and it would further seem that the opportunity to introduce rebuttal testimony is no substitute for cross-examination. In the former case two conflicting lines of evidence stand side by side. Both are self-contained and unrefuted units. In the latter situation there is a good possibility of resolving the conflict and of conclusively disproving, by a witness' own statements, his line of testimony.

The type of evidence which is permissible at the hearing is not governed by rules which prevail in courts of law.⁷⁸ But in general, only

⁷²See, however, transcript of hearing on recommendation of Industry Committee No. 37 for the Cigar Industry, page 26.

⁷³See Rule 11 of the Standard Rules for Hearing set forth in the notice of hearing. A typical example of the rules is found in mimeographed release R-1697, section 8.

⁷⁴See testimony of Sidney C. Sufrin in transcript of cigar industry hearing, note 72 *supra*.

⁷⁵Under sec. 8(d) of the Act and the notice of hearing, only "interested persons" have a right to be heard. At least four or five days before the hearing date these persons must indicate their intention to appear.

⁷⁶ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 38-40.

⁷⁷"Cross-examination is, beyond any doubt, the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, EVIDENCE (3rd ed. 1940) § 1367. See examination of Jute Bagging representative as set forth in transcript of hearing on the recommendations of Industry Committee No. 39 for the textile industry. See also transcript of cigar industry hearing, note 72 *supra*. The right of cross-examination is probably not a requisite of fair hearing since this is in no way an adversary proceeding. See *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 304, 53 Sup. Ct. 350, 354, 77 L. ed. 796, 801 (1933); cf. *Morgan v. United States*, 298 U. S. 468, 481, 56 Sup. Ct. 906, 911, 80 L. ed. 1288, 1295 (1936). "Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense."

⁷⁸*Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U. S.

evidence that is vouched for by the party testifying is admitted into the record.⁷⁹ Thus it is that letters sent by absent parties to be read into the record are excluded unless special arrangement has been made for their inclusion. A point of great dispute has been the admissibility of the record made before the industry committee for all evidentiary purposes. Here in the case of oral testimony, as contrasted with letters and documents submitted for the first time at the Administrator's hearing, there has been an opportunity for cross-examination by the committee members. Introduction of such evidence has been resisted unless the parties originally responsible for it are present and available for questioning. The basis for the objection is that the evidence before the industry committee is not under oath and that there is no present opportunity for cross-examination. The first of these exceptions seems largely formalistic, and although the second is a compelling argument, it should not always be controlling.⁸⁰ One opportunity for cross-examination ought to be sufficient, particularly in a non-adversary proceeding.⁸¹

It is wise to remember in dealing with the problem of the admissibility of evidence here, that the Administrator is a capable person with a skilled staff. He is perfectly able, unlike a trial jury, to evaluate testimony of varying worth. Therefore, while there has been a diversity of rulings, the tendency has been to permit much of the record of the industry committee to be introduced at the Administrator's hearing.⁸²

At the close of proceedings the presiding officer receives written requests from persons appearing therein for oral argument before the

126, 155, 61 Sup. Ct. 524, 85 L. ed. 624 (1941). Much hearsay and argumentative testimony is admitted. See ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, p. 35.

⁷⁹A great deal of the data accumulated by the Bureau of Labor Statistics is given under a pledge of secrecy because of a reluctance on the part of business men to reveal cost and wage figures to their competitors. For this reason the Bureau must refuse to produce its worksheets showing data on individual firms. This was the ground of objection to the introduction of Administrator's exhibit No. 21 in the cigar industry hearing (Transcript of hearing on recommendation of Industry Committee No. 37, pages 180-189). However although this hearing smacks of the quasi-judicial, it is definitely investigatory and not adversary in nature. The Administrator is perfectly capable of evaluating the testimony, and it is admissible. See *Norwegian Nitrogen Co. v. United States*, 233 U. S. 294, 303-315, 53 Sup. Ct. 350, 354-358, 77 L. ed. 796, 801-807 (1933).

⁸⁰See ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 36-40.

⁸¹The purpose of cross-examination is to assure truthful testimony. Testimony which has once been subjected to interrogation has, it would seem, a sufficient guarantee of truthfulness. It is not hearsay evidence. See 5 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 1367 et seq. and especially § 1370.

⁸²See transcript of hearing on recommendation of Industry Committee No. 37 for the Cigar Industry, pages 141-144.

Administrator on the record made at the hearing.⁸³ Opportunity to file briefs is also afforded these parties.⁸⁴

After all the evidence is in,⁸⁵ the presiding officer transmits the record to the Administrator. The review attorney makes a careful and impartial digest of the record and sends this to the Administrator together with the briefs and various other exhibits. The digest is keyed by page reference to the record, and in great part is relied on only as a guide to relevant portions of the transcript.⁸⁶

The Administrator studies the materials, consults with the attorney and economist who have been working on the case and finally issues his

⁸³See Rule 12 of Standard Notice of Hearing Rules; note 73 *supra*.

"The presiding officer may, at his discretion, permit any person appearing in the proceeding to cross-examine any witness offered by another person in so far as is practicable, and to object to the admission or exclusion of evidence by the presiding officer. Requests for permission to cross-examine a witness offered by another person and objections to the admission or exclusion of evidence shall be stated briefly with the reasons for such request or the ground of objection relied on. Such requests or objections shall become a part of the record, but the record shall not include argument thereon except as ordered by the presiding officer. Objections to the approval of the Committee's recommendation and to the promulgation of a wage order based upon such approval must be made at the hearing before the presiding officer."

Although there is nothing which requires the Administrator to hear oral argument [*see Morgan v. United States*, 298 U. S. 468, 481, 56 Sup. Ct. 906, 911, 80 L. ed. 1288, 1295 (1936)], he generally grants it when it is requested.

⁸⁴Rule 13 of Standard Notice of Hearing Rules. "Briefs (12 copies) may be submitted to the Administrator following the close of the hearings, by any persons appearing therein. Notice of the final dates for filing such briefs shall be given by the Administrator in such manner as shall be deemed suitable by him."

⁸⁵See sections 9 and 11(a) of the Act which give the Administrator subpoena and investigatory powers.

⁸⁶This situation is to be differentiated from the first *Morgan* case [298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1288 (1936)], which was an adversary proceeding. It there appeared that the person making the ultimate decision had relied almost entirely on partisan subordinates and had not given a hearing "in a substantial sense."

Cf. Morgan v. United States, 298 U. S. 468, 481, 56 Sup. Ct. 906, 911, 80 L. ed. 1288, 1295 (1936). "Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates."

Under wage and hour procedure, although he usually does not see the witnesses save in oral argument, the Administrator goes over and considers the record much as a judge does in making his decision in a case, and acts throughout as an impartial reviewer of the facts. This procedure is sufficient to satisfy the requirement of fair hearing. *See United States v. Morgan*, 313 U. S. 409, 422, 61 Sup. Ct. 999, 85 L. ed. 1429 (1941).

It may be noted at this point that in any case the Administrator's method of analyzing the record is not open to judicial scrutiny since otherwise the integrity of the administrative process would suffer. *United States v. Morgan*, 313 U. S. 709, 61 Sup. Ct. 999, 85 L. ed. 1429 (1941).

Petition to examine the Administrator and his subordinates was denied by the Court of Appeals for the District of Columbia in the case of *Southern Garment Manufacturers Ass'n v. Fleming*, 122 F.(2d) 622 (App. D. C. 1941). See also *United States v. Morgan*, 307 U. S. 183, 191, 59 Sup. Ct. 795, 799, 83 L. ed. 1211, 1217 (1939); *Morgan v. United States*, 304 U. S. 1, 18, 58 Sup. Ct. 773, 776, 82 L. ed. 1129, 1132 (1938); *cf. Morgan v. United States*, 298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1288 (1936); *National Labor Relations Board v. Cherry Cotton Mills*, 98 F.(2d) 444 (C. C. A. 2nd, 1938); *Cupples Co. Manufacturers v. National Labor Relations Board* 103 F. (2d) 953 (C. C. A. 8th, 1939).

findings and opinion either accepting or rejecting the recommendations together with a wage order putting the rates into effect in case of acceptance. The findings and opinions are drawn up by the review attorney in accordance with the Administrator's directions and constitute an elaborate analysis of the record.⁸⁷

It has been said⁸⁸ that the findings are not usually supported by sufficient evidence in the record. This ignores the purpose of the hearings. The Act merely directs the Administrator to ascertain whether, taking certain factors, specified and unspecified, into consideration, there will be substantial curtailment of employment in the industry as a result of the recommended rates. It does not require that the Administrator be absolutely certain that there be no appreciable falling off in employment, but only that he be reasonably certain.⁸⁹ Any other interpretation would lead to endless hearings and this, considering the lowness of the highest possible minimum, is entirely uncalled for.

The Administrator's assistants perform various duties, many of which have been discussed above. The presiding officer acts very much as does an umpire at an open forum discussion. He questions the witnesses occasionally, preserves order and makes infrequent rulings on the admissibility of evidence. He is inactive in post-hearing events, save that he looks over the printed record to make sure that there have been no serious errors in transcribing the testimony.⁹⁰ It has been suggested that the presiding officer should be the person to analyze the record and that in any case he should be consulted before final decision.⁹¹ While this suggestion might have some merit if a full time examiner were appointed, it would seem problematical whether this would constitute an improvement on the present system.

The review attorney is in an anomalous position as an impartial advocate. In the ideal situation the same lawyer checks the definition,

⁸⁷This is not the case where the order is rejected; there a few cogent reasons suffice. See order rejecting the recommendation of Industry Committee No. 17 for the Jewelry Industry (mimeographed release G-148).

⁸⁸Golding, *The Industry Committee Provisions of the Fair Labor Standards Act* (1941) 50 YALE L. J. 1141, 1161-1175.

⁸⁹Section 10(a) of the Act indicates that findings of fact are to be supported by "substantial evidence," but this phrase means evidence upon which a man can reasonably rely in ordinary business dealings; it means "more than a mere scintilla." See note 66 *supra*.

⁹⁰Rule 14 of the Standard Rules of Procedure (see note 73 *supra*) provides that: "On the close of the hearing the presiding officer shall forthwith file a complete record of the proceedings with the Administrator. The presiding officer shall not file an intermediate report unless so directed by the Administrator. If the report is filed, it shall be advisory and have no binding effect upon the Administrator." The filing of an intermediate report seems an unnecessary waste of time in view of the fact that the committee report is entirely adequate to focus the issues for the Administrator. See ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, p. 41.

⁹¹ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, p. 42.

checks the economic report, services the industry committee, cross-examines witnesses at the Administrator's hearing, introduces relevant data into the record, digests the record, consults with the Administrator and draws up the wage order and the Administrator's findings and opinion. At the Administrator's hearing he is very active in putting in evidence and in eliciting information from witnesses. His duty at this crucial hearing is to build up a record of testimony on relevant points, so that automatic rejection of the recommendations will not be made necessary by a total failure of proof on a vital issue. Whether or not the evidence brought forth is favorable or unfavorable to the recommendations is immaterial.

The present practice developed from suggestions made by the Attorney General's Committee on Administrative Procedure.⁹² At first there were two attorneys. The industry committee counsel serviced the committee and then undertook to uphold the recommendations before the Administrator. The review attorney entered the picture for the first time at the Administrator's hearing as an observer. Following the hearing it was his duty to analyze the record and to assist the Administrator in reaching his decision. The industry committee counsel took no part in the post-hearing phases of the proceedings and so the Administrator lost the advice of one of his most qualified subordinates.⁹³ A second phase was ushered in on March 5, 1940, when the Administrator changed the role of the industry committee counsel to that of impartial advocate charged with the duty of building up a record. The review attorney was still passive, but cooperation between the two was now possible and the Administrator was free to consult with both. The duplication of effort inherent in this transitional stage made it inevitable that the two offices should fuse into one. Of course, some observers doubt the correctness of placing the Administrator's legal representative in the thick of the proceedings. It is said that because of this, the judge may forfeit his position as unbiased examiner. The answer to this is that, on the whole, the lawyers have conducted themselves impartially and that in any case the Administrator is known to be a man of independent judgment who relies upon no single advisor in making his decisions.

⁹²ATTORNEY GENERAL'S COMMITTEE'S MONOGRAPH, pp. 25-33.

⁹³This form of procedure was approved in *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division*, 312 U. S. 126, 154, 61 Sup. Ct. 524 L. ed. 624 (1941), and the argument that the Administrator was taking a position in favor of the recommendations because certain of his employees supported them is specifically rejected in *Southern Garment Manufacturers Ass'n v. Fleming*, 122 F.(2d) 622, 627 (App. D. C. 1941), where it is said that, "... to argue that such a setup is inherently wrong is to overlook the division of personnel and functions common to many administrative agencies."

The economist from the Research and Statistics Branch is likewise an impartial agent. In the ideal case, the same man will check the definition, write the economic survey of the industry, service the industry committee, appear at the Administrator's hearing and advise the Administrator on the proper disposal of the recommendations. In practice, he is an invaluable aid to the attorney as an advisor on the problem of constructing the record. In the early days of administering the Act there were two economists just as there were two attorneys. One supported the recommendations and the other acted as impartial observer. During the transition period the industry committee economist acted as impartial witness and the review economist was still merely an observer. It would not appear that any criticism can be leveled against the consolidation of economic functions under one head.

It has been stated that the Administrator invariably sustains committee recommendations. Admittedly there have been few rejections, but this is largely because the committees have been cautious. Rather than reject a recommendation on the ground that it was not the highest possible under the Act, the Administrator will generally accept it and summon a new committee to reconsider the problem. No one can deplore this procedure. Nevertheless, it may be true that certain juristic considerations tend, in some measure, to support committee recommendations. The chief of these is found in the principle of separation of powers embodied in the Act.

III. CONCLUSION

The structure of the Emergency Price Control Act of 1942,⁹⁴ should be contrasted with the procedure outlined in the Fair Labor Standards Act of 1938. The former statute is built for speed. Commodity prices may be fixed in accordance with statutory standards by immediate action after direct administrative investigation.⁹⁵ "Industry" committees may be called after the fixing of maximum rates, but their recommendations as to modification of the orders are purely advisory.⁹⁶ We have seen that the Wage and Hour Act is an elaborate system of checks and balances which may be conducive to compromise rather than to accuracy of result.

However, the two administrative methods are admirably adapted to their respective purposes. The Price Control Bill is a creature of war

⁹⁴Pub. L. No. 421, 77th Cong., 2d. Sess. (Jan. 30, 1942).

⁹⁵"Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry." *Id.* at § 2(a).

⁹⁶*Ibid.* Provision is also made for issuance of 60-day temporary orders in case of need.

Contrast
Emergency
Price Control
Act
3/11/41

necessity. The Fair Labor Standards Act is a spearhead of permanent progress in social legislation. The one depends for its existence upon extreme economic and social dislocation. The other depends for its existence upon popular good will. All things considered, the Fair Labor Standards Act, with all its admitted defects, has proved a democratic and workable tool.⁹⁷ The advantage of inculcating both industry and labor with a feeling of confidence in minimum wage legislation is worth a little loss of time and a little conservativeness in result.

⁹⁷See discussion in *Morehead ex rel. Tipaldo v. New York*, 298 U. S. 587, 618-631, 56 Sup. Ct. 918, 926-932, 80 L. ed. 1347, 1359-1366 (1936).

THE FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE AND THE REPORT OF THE COMMITTEE ON MINISTERS' POWERS*

J. A. Corry†

The supremacy of law, or alternatively, the rule of law, is the core of the Anglo-American constitutional tradition. It was widely held in the nineteenth century that this fundamental principle could only be surely vindicated through a monopoly of law-making by a responsible elected legislature and a monopoly of judging by the Common Law Courts. There were, even in nineteenth century Anglo-American practice, numerous gaps in the fences of these monopolies which theoretical formulations of constitutional doctrine ignored. But twentieth century practice, which has seen the rapid rise of the administrative as a fourth branch of government with ever-widening powers of rule-making and of settling controversies affecting individual rights, diverges so far from the theory that it cannot be ignored. In the past fifteen years in the United States and in British countries, a vigorous, even fierce, controversy has developed as to whether administrative legislation and adjudication were compatible at all with maintenance of the constitutional tradition and, if they were, what safeguards and limitations ought to be imposed upon their use.

The subject has brought forth an enormous literature. The latest contribution of high importance is the Report of the Attorney General's Committee on Administrative Procedure which for several reasons, will provide a new point of departure in discussions of the problem. The Acheson Committee, as it is being called after its chairman, was composed of two Federal judges, several attorneys of wide experience and half a dozen law teachers who have made administrative law their province, and was commissioned as part of a general program of investigation looking to federal administrative reorganization. Its report is based on the closest detailed study of the administrative process yet made in the United States as in any British country, and the conclusions—and disagreements—of its able members deserve the closest study.

Great Britain, sharing the same constitutional tradition, went through a rapid expansion in the sphere of governmental activities somewhat earlier than did the United States and the anxious concern displayed by the American Bar Association in the thirties was anticipated in legal circles in Brit-

*The FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE is quite frequently spoken of as THE ACHESON REPORT.

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ain in the twenties. In 1929, Lord Hewart, Lord Chief Justice of England, in his book, *The New Depotism*, charged that the British Civil Service had embarked on a course of "administrative lawlessness" which could only be compared with that pursued by the Stuart kings of execrable memory. Shortly after this attack, the Lord Chancellor of England appointed a committee to investigate the question whether the wide powers of legislation and adjudication conferred by statute on Ministers of the Crown (and exercised by the civil service on the responsibility of the Minister) were a serious threat to the fundamental principles of the constitution. This Committee, known as the Committee on Ministers Powers, or alternatively, as the Donoughmore Committee, after its first Chairman, brought in a report in 1931, just ten years before the Acheson Committee. There are notable parallels in the events leading up to the appointment of the two committees and in the tasks imposed upon them. A comparison of their leading conclusions should be relevant in considering the future prospects of the constitutional tradition.

The terms of reference to investigating bodies of this kind not only provide them with possible escapes from issues on which agreement is found to be impossible; they may also limit quite sharply the scope of the inquiry and of the inferences legitimately to be drawn from their conclusions. The Donoughmore Committee was asked only to inquire how far the rise of the administrative imperilled "the constitutional principles of the sovereignty of Parliament and the supremacy of the Law" and consequently their report was primarily directed at finding the limits and safeguards necessary to protect the dogmas of the constitution. They looked at administration from the outside. The Acheson Committee, on the other hand, was asked to determine what criticisms of existing procedure were valid, and to suggest improvements in internal management and organization. It was not specifically directed to find out how far the rise of the administrative is a threat to the fundamentals of the constitution nor to consider the wisdom of the legislation through which Congress has supplied the *raison d'être* of this rise.

However much this restriction of the terms of reference may be regretted, it had one very important advantage. It was impossible to answer the inquiry without first knowing what the administrative procedure really was. No comprehensive and intensive survey had ever been made and accordingly the Committee employed a staff of lawyers to investigate the procedure in rule-making and adjudication of some fifty federal agencies. Their studies finally took the form of twenty-seven monographs published as Senate documents. This makes it possible for the first time to discuss the federal administrative process and its

threat, if any, to the constitution in the light of an adequate and reliable knowledge of the facts.

Of course, the Committee could not suggest improvements without having a purpose for which improvement was sought. In the words of the Attorney General, the purpose was to secure "quick and well-informed action grounded upon the fundamentals of fair play."¹ In the words of the Committee, procedures must be judged by whether they ensure "impartial justice to all private interests involved with full recognition of the rights secured by law."² In an ultimate sense, then, the task of the two Committees was the same—how to preserve the essence of the constitutional tradition in the face of the administrative process. The differences are differences of emphasis.

The differences of emphasis, however, were important. The Donoughmore Committee produced a short report indicating what the administrative ought not to do, or ought not to be allowed to do. The Acheson Committee had, in addition, to say how the administrative should be organized and how it ought to proceed. Some of its conclusions are general, applicable to all agencies but many are specific suggesting improvements in particular agencies. Its research monographs provided it with so much learning about the complexities of administration that it felt impelled to bring together the salient features of its discoveries in a number of memoranda which appear as appendices to the report. These memoranda contain a wealth of illuminating data on the volume of business before administrative agencies, the time consumed in reaching decisions, reliance upon precedent, use of written evidence, etc. The result is five hundred pages of immensely valuable material.

The Acheson Committee found itself in disagreement on several important matters, resulting in a majority and two minority reports. Four of the eleven members thought the majority views did not provide for adequate control of the administrative on certain points and they submitted their own views separately on these issues. One of the four thought that even these proposals did not go far enough and appended his own conclusions separately. These dissents are not general nor outright but they bring vividly to attention the central points of controversy.

Both Committees made some general comments on the administrative process. The Donoughmore Committee declared they were unable to find any shred of evidence that the civil service was trying to subvert the constitution nor any indication that their exercise of legislative and

¹FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 251.

²*Id.* at 2.

judicial powers had resulted in significant injustice or denial of private right. They warned that there were considerable dangers of abuse but, that in view of the multitudinous duties being heaped upon government by the legislature, the practice was inevitable and the real problem was one of adequate safeguards. The Acheson Report does not differ from these conclusions in any substantial way.³ Even the minority, much disturbed about the situation, concludes that "the administrative agency is a principal means of injecting the element of discretion into government and bringing the judgment of men to bear on the multitude of situations which arise in the daily enforcement of statutes. Such discretionary power is a necessary adjunct of present-day government. . . ."⁴

*Safeguards
Donoughmore
396-397*
It is a matter, then, of ~~safeguards~~. While those proposed by the Donoughmore Committee can be reduced to summary form, the proposals of the Acheson Report are so many and varied that they cannot be set forth fully in this review. The special recommendation respecting particular agencies must be sought at large in the Report itself. And only what seem to be the more important of the general conclusions will be adverted to here.

As to rule-making powers, the Donoughmore Committee recommended that Parliament should always, except in the most extraordinary circumstances, circumscribe, in precise and restricting terms, any power granted to the Executive to make rules and regulations under a statute.⁵ Rules, when made, should always be laid before Parliament and be open to annulment by resolution of either House within a stated period. Moreover, a standing committee of each House should be set up to report to the House on every bill containing such powers and to consider and report on all rules and regulations made in pursuance of such powers. Parliament was urged to control very jealously all delegated legislative power.

In the United States, it is clear since *Panama Refining Co. v. Ryan*⁶ that there is a constitutional requirement of a statutory definition of the circumstances and conditions under which the delegated power is to be exercised. The Acheson Committee did not need to deal with the point. They declined to recommend a general requirement that rules should be laid before Congress, holding that legislative control has not been effective where tried. In England, as here, the difficulty is a lack of desire rather than a lack of opportunity. And the reason for this rests in a

³ATTORNEY GENERAL'S COMMITTEE, 5, 257.

⁴*Id.* at 215.

⁵It is always to be remembered that in Britain, Parliament is fully sovereign and all safeguards must be self-imposed.

⁶293 U. S. 388, 55 Sup. Ct. 241, 79 L. ed. 446 (1935).

lack of the time and technical knowledge needed to scrutinize with any care the vast Niagara of rules and regulations now poured out every year. But Congress and the public ought to know what is going on, and therefore they recommend that every agency with rule-making powers be required to report annually to Congress on its rule-making activities. Furthermore, rules should not come into effect for a specified period after their announcement so as to allow interested parties to protest and urge modification, subject always to a power to dispense with such a period where prompt action is necessary.

Seeing that no substantial increase of effective Parliamentary scrutiny followed the recommendations in Great Britain,⁷ the Acheson Committee seem to have some reason for regarding legislative control as illusory. But they do not pin their hope of satisfactory control on annual reports and deferred effectiveness. They urge, in effect, that if popular control over administrative rule-making is to be asserted, it must be done through associating the section of the public which is affected with the process of rule-making itself in the several agencies. The various interests affected by the rules to be made by, say, the Civil Aeronautics Authority should be consulted by the agency in advance and their protests and suggestions carefully considered. This consultation, in one form or another, has now become almost standard practice both in Britain and the United States. It may take the form of an advisory committee representing the various interests, or it may go as far as formal hearing with notice and an invitation to the interested public to attend.

They are of the opinion that the hearing where the agency is publicly exposed to the shock of adverse criticism on reasoned grounds should be standard practice. However, they warn against the danger involved in the tendency to turn these hearings into quasi-judicial proceedings. In certain cases, it may be desirable to treat such hearings as contentious but that should never lead, either as a matter of law or practice, to a requirement that the regulations made must be supported by findings of fact based on evidence contained in the record. What rules are to be made is a matter of effectuating the will of Congress as expressed in the statute. The legitimate purpose of the hearing is to bring the greatest possible amount of relevant data squarely to the attention of the agency. This done, the agency ought to have the undivided responsibility of making the rules, subject, of course, to the limits imposed by the Constitution and by the statute itself. The public hearing is, in itself, a severe discipline on the agency—a considerable guarantee against hole-in-corner methods.

Hearings under admin. process 39-1-398

⁷CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW (1941). Appendix.

The Donoughmore Committee also thought that the interests concerned in rule-making should be consulted as widely as possible. But they do not emphasize it as did the Acheson Committee who clearly thought of it, not merely as a desirable present tendency but as a principal means for keeping rule-making in harmony with the constitutional tradition.

*Excluded
Judicial
Review*

This does not deny that judicial review of regulations, available in Britain as well as in the United States, is an important check. Both Committees approved it but for limited purposes only. Except for scrutiny to see that the regulation meets the requirements of the United States Constitution, neither wanted judicial review to go beyond the question whether the regulation made was within the scope of the power delegated by the statute—the question of *vires*, as it is called in England. The Acheson Committee deprecated strongly the tendency revealed in some recent federal statutes requiring the substance of regulations to be justified by findings of fact based on a record built up at an adversary hearing, thus exposing the regulation to judicial review on the question whether there was evidence to support it.

*Drop 2nd
398-100*

Most of the controversy on administrative powers has centered on administrative adjudication. In appearance, at any rate, administrative adjudication is a serious usurpation of the judicial function when, as frequently happens, the procedure followed ignores the accumulated experience distilled in the judicial process. It threatens the professional preserves of the lawyer and disturbs his professional sense of the fitness of things. Lawyers have been the most persistent critics of the administrative, as witness the work of the American Bar Association which issued first in the Logan bill to set up a Federal Administrative Court and later in the Logan-Walter bill to impose a uniform code of procedure on the judicial model on administrative agencies. The interest thus aroused ensured that the Acheson Committee would give its closest attention to these aspects of the matter and it was precisely on these that they had their divisions of opinion.

Despite the differences of opinion, the Committee contributes much to the understanding of these matters of deep controversy. Their research studies as has already been said, produced for the first time a clear view of the procedure followed by all the important federal agencies. They brought to light the almost infinite variety of different types of fact-situations which come before the various agencies for adjudication. Even if the observer concludes that administrative procedure is a mad confusion, he will be forced to concede that there is generally some method in the madness. Variations in procedure from one agency

to another are mostly responses to the peculiar angles of different fact-situations. One reason why the Courts have been forsaken for these new-fangled tribunals is that judicial procedure, being relatively inflexible, was not adaptable to trying the new kinds of issues arising under regulatory and social security statutes.

The studies and investigations showed the enormous importance of informal methods of adjudication in the administrative process. Vast numbers of cases are dealt with and, in most agencies, only an infinitesimal number do not respond to settlement by conference, negotiation or consent order. The stubborn disputes which go forward to formal adjudication are very few, relatively to the total number handled. Indeed, a mere glance at the volume of issues coming before most agencies will show that they could not get through their work at all if informal procedures were not normally enough. Moreover, (by implication, rather than by explicit finding) this imperative necessity to get rapid informal disposition of issues is an internal restraint on arbitrariness because high-handed action will rouse opposition and compel the agency to go forward to formal adjudication. Indeed, if administrative action were as high-handed in the generality of cases as the allegations often based on specific instances would indicate, the administrative process would have broken down long ago. In most cases, the agency in question must go on dealing with the person or corporation which appears to its summons and what is required is not merely a disposition of the present issue but a *modus vivendi* for the future. One of the most important demonstrations of the Acheson Report is that informal procedures are "the lifeblood of the administrative process." Many of the recommendations are directed to extending and improving the practices of informal settlement.

On these matters, there was no significant disagreement between members of the Committee. The differences of opinion arose mainly about formal adjudication on which most of the public controversy has centered. The American Bar Association has been most critical of the joining of prosecuting and judging functions in the same agency, proposing that all judging functions should be transferred to a Federal Administrative Court. The President's Committee on Administrative Management several years ago, in recommending that the independent regulatory commissions should be brought within one or other of the existing Departments of State, nevertheless urged that the judicial functions of these agencies should be put in the hands of an independent judicial body. The Logan-Walter Bill proposed a uniform code of procedure on the judicial model to compel a fair and adequate hearing. The majority of the Acheson Committee rejects these proposals while the minority, in substance, supports them.

The majority does not believe that the real justification for complaints is the joining of judging and prosecuting in the same agency or the failure of administrative procedure to follow judicial models. "If the initial decision—which may dispose of the case or be the statement of it from which appeal may be taken to the heads (of the agency)—can carry a hallmark of fairness and capacity, a great part of the criticisms of administrative agencies will have been met."⁸ Basically, they conclude that the frequent absence of this hallmark is due to the facts that (1) the officer who conducts the initial hearing is not of a sufficiently high quality, and (2) the hearing officer has commonly no power to give a binding decision but merely gathers information upon which anonymous persons make a decision which the agency heads, in turn, announce in due course. Everyone ought to have the right to confront his judge and it is only natural that confidence in the fairness of the proceedings evaporates when the officer who hears the testimony and argument has no power to make any decision one way or the other. Confidence is still further dissipated when it is not infrequently seen that the hearing officer has not the ability to comprehend the significance of evidence and argument. Thus the majority concluded that every agency should have one or more hearing commissioners with power to decide issues finally at the initial hearing, subject, of course, to formal appeal to the heads of the agency. These officers should be of a high quality, paid an adequate salary, independently appointed for a fixed term of seven years and subject to removal for cause only by a board independent of the agency. The aim is to give the hearing commissioner a semi-judicial independence. But he would remain an officer of the agency which would have power to overrule his findings on appeal or on the motion of the agency heads. That is to say, the majority refuse to recommend sharp separation of prosecuting and judging. Their reasons will be considered later.

The majority of the Committee believes that able, fair-minded men in the post of hearing commissioner will not only follow a fair procedure but will also, by their demeanour, give a convincing impression of fairness which is what really counts. Thus they think it would not be necessary to impose upon them a uniform code of procedure. They further think it would be unwise because the issues coming up for adjudication vary from agency to agency and one of the prime reasons for the growth of administrative adjudication is to enable procedure to be adapted to the special characteristics of a particular class of fact-situations. And it must be said that it is impossible to read the material brought to light by the Report without becoming aware that this is an argument of considerable force.

⁸ATTORNEY GENERAL'S COMMITTEE, 43-44.

This does not mean that the majority regard present administrative procedures as satisfactory. Many of the public criticisms made are amply justified though not always on the grounds specified. The Committee makes many strictures applicable to all or to several agencies. Hearings are often slow and dilatory and lacking in decorum, notice of hearing is frequently not specific enough, putting parties to the proof on broad issues which they can scarcely prepare to meet, remote hearsay, irrelevant and unreliable testimony is often permitted and the record becomes over-voluminous. There are many other criticisms of the practices of particular agencies.

*Appro. 50
UPC et
Cim. 1000
Habeas
20-11-42*

Aside from the appointment of hearing commissioners of high quality who could be counted on to improve procedure, the majority proposes the setting up of an office of Federal Administrative Procedure which would continue the researches and analyses made by the Committee. It would be composed of a Director, a judge of the United States Court of Appeals for the District of Columbia, and the Director of the Administrative Office of United States Courts. It would choose the hearing commissioners from panels submitted by the agencies and would hear applications for their dismissal. But its main job would be continuous study and comparison of the procedures of various agencies, seeking simplification and improvement, recommending uniformity where study made it seem desirable, investigating complaints of unfair procedure, giving publicity to proceedings before agencies and making an annual report to the President and Congress on its work. Administrative activities are now so vast and so complex that a staff agency is required to give the matter sustained attention.

The minority was not prepared to recommend a continuance of the prosecutor-judge combination within a single agency. Four of the eleven members of the Committee declared for the principle of complete separation. However, none of them was prepared to recommend a separate administrative judiciary with all the duplication of present administrative organization which would be involved. Three of them acknowledged very serious practical difficulties, to be adverted to later, and, in effect, acquiesced for the time being in the majority recommendations of hearing commissioners within each agency. The fourth proposed that all hearing commissioners should be officers of the Office of Administrative Procedure and assigned to hearings as the needs of the various agencies dictated.

If formal separation was not practicable, the minority was insistent that the question of a fair procedure ought not to be left to the hearing commissioners and the Office of Administrative Procedure. They draft-

ed a bill covering some thirty pages in the Report containing a uniform code of procedure which, they argued, ought to be enacted as law by Congress and observed by all agencies. But they paid tribute to the majority view about the infinite variety of the administrative process by inserting a clause authorizing the President to suspend its operation with respect to any particular agency if it proved to be impracticable or unworkable. Furthermore, a great many of the provisions of the code are not really mandatory at all. For example, "Required reports shall be simplified as far as possible."⁹ "... such summaries shall, as far as deemed practicable, cover the public documents or positions of all parties to the proceedings . . ."¹⁰ A remarkable number of the sections of the code are qualified in a similar way.¹¹ The minority obviously had grave difficulty in finding rigid requirements which did not conceivably threaten to impede efficient administration in one or other of the agencies.

Problems
202-4
In view of the fact that the Committee disagreed and that weighty opinion is sharply at variance with the view of the majority, the question of the separation of the prosecuting and judging functions should be examined more closely. The grounds of the minority opinion that impartiality can only be certainly secured by separation are well known. The majority agreed that complete separation is desirable where other overriding considerations do not exist. What are the countervailing factors which to them were decisive?

The powers given by Congress to the administrative are given to further some purpose which Congress thinks is an urgent public policy. For various reasons, Congress frequently cannot state in precise terms of law what conduct the policy requires of individuals in the unforeseeable diversity of situations arising from day to day. All it has found itself able to do is to set up a vague general standard and give the administrative a discretion to apply it. "... the statutory prohibitions which administrative agencies are commonly called upon to enforce are not and cannot be as clear and precise as a promissory note or bill of sale. They necessarily describe in general terms and with emphasis on tendency or effect, those practices which are forbidden."¹² For example, administrative adjudication in the various agencies is constantly having to decide what conduct amounts to "unreasonable preference," "unfair methods of competition," "unfair, unjustly discriminatory and deceptive practice or device," "full and fair disclosure," what "public convenience and necessity" requires and so on.¹³

⁹ATTORNEY GENERAL'S COMMITTEE, 220, § 106.

¹⁰*Id.* at 221, § 108.

¹¹*E.g.*, p. 221, § 107; p. 227, § 207; p. 229 § 209.

¹²*Id.* at 59.

¹³See, generally, Appendix B.

In the course of time, it may be possible to expand these generalities into a series of specific rules covering concrete situations. Before that will be possible, it is necessary to make a sustained study of the sector of human activity to which the prohibition applies, gradually accumulating a body of knowledge and experience as to what specifically it is necessary to prohibit in order to give effect to the policy of Congress. If and when concrete rules defining "public convenience and necessity" in all its aspects are made, then the subject-matter can be—and should be—transferred back into the judicial system. Until that happens, application of the vague standard must be discretionary, guided by the gradually accumulating body of knowledge on the subject, by experience gained in negotiation and informal settlement and even by "an intuition of experience which outruns analysis."¹⁴ No one who lacks this knowledge and experience, no matter how impartial he may be, can contribute anything to the reasonable exercise of these discretionary powers except a "hunch." And since the principal storehouse of this knowledge and experience is in the administrative agency charged with executing the policy of Congress, adjudication cannot be separated from investigation, study, informal negotiation and prosecution without imperilling effective pursuit of that policy.

Thus, the majority argue, separation would have most serious consequences. It is not merely that adjudication would be out of touch with the indispensable knowledge and experience of the agency and thus inadequately informed of its task. The judging body and the administering body would often take different views of the meaning of the vague statutory standard thus bringing delay and further uncertainty into the relations between the administration and the public. The number of prosecutions would increase greatly because that would be the only way of discovering what the judging body would do in relation to specific facts. The administering body would no longer feel full responsibility for the process as a whole. Worst of all, it would hamper greatly all the procedures for negotiation and informal settlement because the validity of the basis of settlement would always be in doubt until the judging agency had passed on it. In place of a relatively orderly development of agency policy, there would be confusion, friction and a breakdown of responsibility.

It can be seen from this challenging argument that there is much to be said on both sides. The conclusions of the Donoughmore Committee on the comparable situation in Britain should be looked at. They had

¹⁴Holmes, J., in *Chicago B. & Q. Ry., v. Babcock*, 204 U. S. 585, 598, 27 Sup. Ct. 326, 51 L. ed. 636, 640 (1906).

before them a proposal to set up a system of administrative courts which would decide finally all issues of a judicial or quasi-judicial character arising out of governmental administration. They rejected it. They recommended, as a general rule, that purely judicial functions should never be left to a Minister, *i.e.*, a government department. If, for some reason, they could not conveniently be reserved to the Common Law Courts, they should be conferred on either (1) a specialized court of law¹⁵ or (2) on a Ministerial tribunal, meaning thereby a tribunal appointed by a Minister, but not subject to control or reversal of decision by him.¹⁶

However, they distinguished from the purely judicial, a large number of quasi-judicial functions which they asserted should rest with the Minister for determination on his responsibility without the interposition of a binding decision by a subordinate officer comparable to the hearing commissioner. In the British practice in administrative adjudication, there is generally an "inspector" who holds an "inquiry," hears the evidence and argument, then submits his determination on questions of fact and his recommendations for disposition of the case to his superiors but does not give any decision, either interim or final. The Committee approved this practice because a quasi-judicial decision turns not upon law judicially applied but upon the policy of the legislature laid down in the statute and administratively interpreted and applied to the particular case. And because the Executive is responsible to Parliament for its conduct of administration, and responsibility is enforced by calling the Minister to account on the floor of the House of Commons, the Minister must have the power to make the decision of policy for which he will be held responsible. That is to say, ultimate control over the substance of a quasi-judicial decision is a legislative rather than a judicial matter.

It is at once obvious that constitutional provisions make the situation different in the United States. The separation of powers prevents direct Congressional control over administrative adjudication by any agency organized under the President. This explains, in part, why Congress has favoured the independent administrative commission, more susceptible to legislative influence. It explains, in part, the demand for the judicializing of all administrative adjudication in the United States. Bodies which are not subject to legislative control ought to be brought under the restraints of the judicial spirit. It might be thought, therefore, that the conclusions of the British Committee are irrelevant in examining the disagreements of the Acheson Committee. But there is a

¹⁵Comparable, for example, to the United States Court of Claims.

¹⁶Therefore enjoying much greater independence than the proposed hearing commissioners.

sense in which this distinction between judicial and quasi-judicial is the crux of the whole matter in both countries. The distinction, as put forward by the Donoughmore Committee, must be examined more closely.

Modern government exercises a great variety of powers which get seriously entangled in the continuing course of administration. The power of rule-making can be marked off fairly readily as legislative because it involves making general rules for future conduct. But apart from this, the administration every day does a great variety of things which affect what individuals are permitted or required to do. Some of these acts are purely administrative, entirely discretionary—deciding where to place a government contract or whether to grant naturalization to an alien.¹⁷ Some are judicial in the best sense in that they are to be taken only after the facts have been honestly determined and the whole submitted to the arbitrament of a rule of law which determines the decision.¹⁸ Also, there are many where the statute gives a discretion to be guided by a vague standard. There is a judicial element because the decision is to be made in the light of an honest determination of the facts and through an impartial and balanced exercise of the discretion. But the decision is not foreordained by an inexorable law; it is arrived at by considering what furtherance of the policy of the legislature as laid down in the statute requires in this particular case. This, according to the Donoughmore Committee, is a quasi-judicial decision.¹⁹ Such decisions must be made by the Minister, or, at any rate, by someone under his control and supervision because he is responsible for bringing the administration in line with the policy of the legislature. Consequently, they concluded that quasi-judicial powers cannot be hived off to an independent tribunal and that a system of separate administrative courts is incompatible with maintenance of responsible parliamentary government.

They saw this clearly because of the predicament in which any other alternative would put the Minister. That predicament does not arise in the United States. The real point, however, is a deeper one. The purpose of parliamentary responsibility of the Minister out of which the predicament arises is to ensure that administration will drive on to the

¹⁷For illustrations of somewhat similar powers, see *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040 (1904); *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 60 Sup. Ct. 869, 84 L. ed. 1108 (1940).

¹⁸It is to be noted that "judicial" is not being used here in the limited constitutional sense. See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 22.

¹⁹While these distinctions between the different kinds of powers are illuminating for present purposes, their general validity may be queried. It is doubtful whether anyone has carried the discussion of the nature of legislative, judicial and quasi-judicial powers beyond the point where Dickinson, *supra* note 18, took it twelve years ago.

objectives of legislative policy and putting the power of administrative adjudication in separate hands would defeat that purpose. Thus, in the end, the argument of the Donoughmore Committee is the same as that of the majority of the Acheson Committee. The analysis showing the close relation of quasi-judicial to legislative action helps to clarify the issue. The final confirmation comes from the minority of the Acheson Committee in acquiescing for the time being, in the majority view that the hearing commissioners should be established inside the administrative agency. They say:

" . . . there are obvious difficulties in such [*i.e.*, outright] separation in areas of administrative law in which the practice of administrative discretion is large. . . . so far and as rapidly as possible, the legislative standards under which such discretionary powers are exercised should be made more precise. Unless and until such discretion is reduced, separation of functions is peculiarly difficult since, if functions are separated, two agencies would determine policy."²⁰

They go on to say that wherever discretion has been exercised and law, in the sense of precise rules, has taken its place, the function of judging should be separated. This is the recommendation of the Donoughmore Committee and the majority of the Acheson Committee does not dissent from it. The truth is, however, that the number of purely judicial powers in the hands of administrative agencies are fewer than might appear at first glance and, unfortunately, the exercise of these is so often merely a step in proceeding to a quasi-judicial decision that separation is still "peculiarly difficult." And, most important of all, it is precisely these broad discretionary powers in the hands of the great regulatory commissions and other federal agencies which are the main objects of concern. They naturally cause more concern in the United States than in England because, due to the separation of powers, legislative control of them can scarcely be relied on.

On the question of the procedure to be followed by administrative bodies, the Donoughmore Committee agreed that maintenance of the constitution did not require the imposition of a detailed code of procedure. As long as a basic minimum of fairness was followed, they concluded that a certain degree of elasticity may be not only necessary but desirable.²¹ The minimum involves observance of four main principles. First, the Minister (or his subordinates) should not participate in any decision in which he has a bias or personal interest, strong views on public policy being noted as a subtle and dangerous form of bias. Where

²⁰ATTORNEY GENERAL'S COMMITTEE, 207-208.

²¹COMMITTEE ON MINISTERS' POWERS REPORT (1932) 99.

such disqualification operates, a Minister should not participate in the judicial portions of even a quasi-judicial decision but the Committee did not explain how, in practice, this could be done if the Minister must remain responsible for the final decision. Secondly, every party is entitled to notice of the kind of case he will have to meet and to a hearing, though not necessarily an oral one. Thirdly, a party should always be advised of the reasons for any decision affecting his rights, with the qualification that where the final decision is based solely on the Minister's views of public policy, the advice may properly be limited to a statement to that effect. Finally, after much weighing of the pros and cons, they recommended that the inspector's report to his superiors on the inquiry held by him should always be made known to the parties even where the inquiry was preliminary to a quasi-judicial decision. Parties should know that the inspector did not overlook or misunderstand any essential fact, even though the Committee did not recommend any right of appeal on questions of fact. Apart from these requirements which they regarded as necessary either to the doing of justice or the maintenance of public confidence in the administrative process, they were prepared to trust the integrity of the Civil Service for fairness of procedure. Thus they came down closer to the majority than to the minority of the Acheson Committee.

There remains the important question of judicial control of administrative adjudication. The Donoughmore Committee recommended that there should always be a direct appeal to the ordinary judicial courts on any question of law but that only in exceptional circumstances should there ever be an appeal on a question of fact, the view being that the courts cannot helpfully review the expert administrative determination of facts. They also recommended that the whole process of administrative adjudication should continue to be open to judicial review (as distinct from appeal proper) through an independent attack by the prerogative writs of certiorari, mandamus and prohibition. As the law now stands in Great Britain, this independent attack enables the courts to check administrative authorities which have exceeded their statutory jurisdiction, erred in applying the law, failed to observe a minimum of fair procedure²² or been infected by bias or personal interests. It has not however, been interpreted as authorizing any review on questions of fact beyond

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²²There are, of course, no constitutional requirements in England comparable to the due process clauses in the United States. Accordingly, Parliament may, by express words, authorize a procedure of extreme arbitrariness which the courts could not touch. But in the absence of statutory direction, there are certain common law requirements of fair procedure which resemble procedural due process requirements in the United States. They do not go as far as the due process clauses in requiring administrative procedure to be modelled on judicial procedure. See *Local Government Board v. Arledge*, [1915] A. C. 120.

the question (which is essentially one of law and cannot be properly asked except in relation to an essentially judicial proceedings) whether there was any evidence on which the administrative agency could reasonably have based its decision. The Committee urged the maintenance of this supervision by the courts but did not suggest any modification of the principles on which it is exercised.

Judicial review got less discussion from the Donoughmore Committee than any other of the important matters it investigated. There are a number of reasons for this. Judicial review in Great Britain is not complicated by questions of overriding constitutional rights and guarantees as in the United States. Statutes do not normally give directions as to scope of review and the Common Law principles are reasonably well settled although application to particular cases often gives difficulty. Broadly speaking, there has not been any controversy over the adequacy of the present scope of review. In the United States, these simplifications are lacking. The scope of review has varied from one agency to another and from one court to another giving an impression of uncertainty. There has also been widespread disagreement as to the degree of finality which administrative decisions should have, particularly findings of fact.

It is not surprising, therefore, that there should have been disagreement among the members of the Acheson Committee. The minority took the view that until there is complete separation of prosecuting and judging functions, there should be great, even increasing, emphasis on judicial review. They urged that, at least, until Congress finds it practicable to legislate for each agency on its merits, there should be a general statutory definition of availability and scope of review so as to reduce uncertainty and variability. They also insist that, as soon as possible, agencies should be classified according to the degree of technical difficulty of their operations, the degree of public confidence reposed in them, etc., and varying, yet precise, legislative standards of review applied to each class. The Courts should not be asked to make the delicate decision as to how far they should review the decisions of a particular agency. Finally, they proposed that confusions over the scope of review of administrative determinations of fact should be clarified by definitely authorizing the Courts to set aside decisions "clearly contrary to the manifest weight of evidence."

The majority declared themselves opposed to any substantial change. The permissible area and scope are reasonably well established. Actual application varies from agency to agency, as the minority assert, but the majority think this is desirable rather than deplorable. They think that

the Courts, in deciding how sharply to check a particular agency, have been influenced by various factors such as the character of the agency, the nature of its problems, the degree to which review would impede its essential functions and overburden the courts, the degree of public confidence it has won, and so on. Such flexibility is desirable because it enables full advantage to be taken of the administrative process while retaining a potential check of vital importance. And if Congress is not satisfied with the treatment accorded by the courts to a particular agency it may embody specific directions in a statute.

With respect to administrative determination of facts, the majority admits that there may be some in which the courts should be empowered to review the bearing of the weight of evidence. Generally speaking, however, the courts ought not to go beyond the question whether there was substantial evidence on which the finding could be based because that might result in administrative agencies becoming "little more than media for transmission of the evidence to the courts." Particularly where, as is commonly the case, the facts found are not "brute" facts, testified to by the senses but consist of complex inferences arrived at by the use of technical knowledge or special experience, the courts are not in a position to say in what direction the manifest weight of the evidence really bears. If they attempt it, they destroy the advantages of specialization and divide the responsibility for administrative adjudication.

This does not mean a clean bill of health for administrative fact-finding as at present conducted by the federal agencies. The majority records its conviction that "Dissatisfaction with existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by administrative bodies."²³ That is to say, they rely for improvement not so much on external control, vital though it may be for the curbing of extremes, as on internal improvements in the quality of hearing officers and revision of procedure. In support of this line of attack, they point out that judicial review is, after all, negative; it prevents improper exercise but cannot compel proper and effective administration of Congressional policies. Even its negative action operates on only a tiny fraction of the vast total of agency decisions. The Courts cannot review them all because they have not the time, or because business cannot tolerate the delay involved or because of the expense involved for parties who cannot afford it. Moreover, in many of the regulatory agencies the injustice, if any, is done irretrievably when the agency takes action, *e.g.*, to delist a security. In

²³ATTORNEY GENERAL'S COMMITTEE, 92.

such circumstances, the emphasis must go on internal improvement rather than on judicial review.

For reasons already noted, the Donoughmore Committee did not concern itself with internal administrative reforms. On the question of what can be termed safeguards in administrative adjudication, however, there is a striking similarity between their conclusions and those of the majority of the Acheson Committee.

It remains to be said that this discussion does not begin to do justice to the quality of the Acheson Report as a whole. The opening chapter contains the best statement yet published on the characteristics of the administrative process and the reasons for its rise. There is scarcely an argument used by either majority or minority which is not fortified by illuminating illustration. Whether or not, their conclusions are convincing, they command respect. All further discussion will have to draw deeply from this source.

Much further discussion will no doubt be necessary. The Donoughmore Committee was very effective in Britain in reassuring the public that there was nothing basically unsound in the direction developments were taking. But that was ten years ago and many startling things have happened in the sphere of government in the interval. The Acheson Report will not be so reassuring because of the lack of unanimity, although the divergence of view is not great when the Report is considered as a whole. There will be concern over the fact that the minority, in their concrete proposals, were not always able to meet the substance of their own criticisms. The clear tendency of the majority opinion is that reliance must be put, to use their own words, on the staffing of the administrative with "wise and self-controlled men" and not upon serried hedges of detailed rules. This will be something short of comfort for those who pin their hope on a government of laws and not of men.

It would be a rash man who would say that the recommendations of the Donoughmore Committee or of either the majority or minority of the Acheson Committee will suffice to preserve the supremacy of law. Yet it would be equally rash to say that a considerable range of discretionary powers in the hands of a government is necessarily destructive of it so long as these powers have defined limits and are exercised by wise and self-controlled men. Neither British nor American government was ever so completely a government of laws as formal theory made them out to be. Further, it may even be that it is not governmental forms at all but the character and extent of changes in the economic and social structure as a whole which will determine the fate of constitutionalism. So, whether the issue be that constitutionalism is doomed by the continuance

of the administrative process on its present scale or that constitutionalism can be preserved by reforms of the order proposed, the verdict in either case at present must be the Scottish one—not proven!

One thing, it may be hazarded, emerges fairly clearly. Given the objectives of present-day government as imposed on it by the legislature, and the determination to push forward towards them, the administrative process is the necessary instrument for the purpose. Moreover, the majority of the Acheson Committee are pretty convincing that their measures are better designed than those of the minority to make the instrument effective. It follows that those who still think the supremacy of law is in imminent peril should inquire what are the social forces which make the mounting demands for governmental action with a view to seeing how these demands can be moderated.

THE LITERATURE OF ADMINISTRATIVE LAW

*Shelden D. Elliott**

"Can you recommend a good book on Administrative Law?" If the inquirer is seeking a single text or treatise that will give a comprehensive and analytical survey of the subject, the questioner is hard put to find a satisfactory answer. Perhaps there is one. Perhaps the perspective of passing time will focus on one or another of the many writers contributing to the growing literature on Administrative Law, and lawyers of a later day may point to his work as the Blackstone, the Williston, or the Wigmore of this field. For the present, however, lawyer and layman alike must choose for themselves from among a varied array of textbooks, casebooks, essays, law review articles, case-notes, and committee reports. The difficulty is not that there are so few books and writings on Administrative Law. Rather, the very volume and variety of materials indicate that the viewpoints to be expressed cover a wide range. Whether the reader finds himself inclined to agree or to disagree with this or that writer's basic philosophy toward administrative agencies or toward the proper functions of government in general is of secondary importance. If he is interested in obtaining an overall understanding of the subject, or in building a library of reference materials, he will want to include at least a fairly representative sampling.

As a comparative newcomer to Anglo-American jurisprudence, Administrative Law has not yet entirely emerged from the amorphous stage. Neither its outward limits, nor its internal component structure have taken definite form. Many of the early writers, approaching the subject from different aspects attempted, like the blind men and the elephant, to visualize it in large from their respective points of contact. Hence, to some it meant primarily the legal problems encountered by government in achieving effective organization and action. To others, it meant the common law remedies against governmental encroachment on the rights of the individual citizen. Some viewed it as an elaboration of constitutional principles of the separation and delegation of powers and the scope of judicial review. Still others have preferred to view it as a study of the procedures of particular administrative agencies. More recently there has developed a tendency toward uniformity of approach by synthesizing the several aspects and considering each in relation to the subject in its entirety. This trend becomes more apparent upon a review of the more recent texts and casebooks.

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The following survey is designed merely to indicate some of the reference works which might interest the inquiring reader who seeks to broaden his background knowledge of the field. It does not purport to be by any means a comprehensive bibliography of reading materials, but rather, a selective sampling. The growth of administrative agencies has its champions and its opponents, and their respective attitudes have been urgently, even vehemently, put forward. It is not the purpose here to assay the merits of either side of the case, but simply to indicate where these viewpoints may be found. Omissions of particular works or writers from the following commentary should not be construed as reflecting on the worth of their respective contributions. It is merely the unavoidable result of the reviewer's selection of those materials which have been available to him.

In order to confine the article to reasonable compass, the references are limited to those that deal primarily with the basic substance and principles of Administrative Law. There is of course a wealth of valuable material pertaining to individual administrative agencies, their jurisdiction, functions, and procedures. The lawyer confronted with a problem involving a particular agency may find some assistance in the basic references, but for specific information he will have to carry his search much farther.

For classification and convenience the references are grouped under the respective headings of "Textbooks," "Casebooks," "Committee Reports," "Manuals and Current Services," and "Law Review Symposia." No attempt is made to enumerate or give due credit to the many individual law review articles, comments, and case-notes which have contributed greatly to an understanding of Administrative Law. Reports of state bar association committees, and lectures and addresses before meetings of bar associations and other public groups are likewise valuable sources of information which of necessity cannot be catalogued herein.

TEXTBOOKS

While it is possible to trace the origin of certain concepts of Administrative Law and its modern problems as far back as Plato and Aristotle, the subject as a distinct field of legal study did not command the attention of English and American law writers until near the end of the last century. The emergence of government regulation in the form of independent commissions and administrative tribunals had evoked an occasional protest,¹ but it remained for A. V. Dicey, writing in England in 1885, to sound the general alarm against what he regarded as a dangerous

¹Such as, for example, J. TOULMAN SMITH'S *GOVERNMENT BY COMMISSION*, S. Sweet: London (1849), reviewed by Professor Cavers in (1938) 47 *YALE L. J.* 675.

encroachment on individual liberty and the rule of law. The novice reader therefore would do well to begin his background study with Professor Dicey's *Law of the Constitution*.² To Dicey the two fundamental tenets to be safeguarded were (1) that no man should be proceeded against except in a proper legal action before one of the regularly constituted courts, and (2) that legal answerability for wrongful acts should attach equally to citizens and officials alike. He foresaw, whether rightly or wrongly, the imminence in England of a separate system of administrative courts comparable to the French *droit administratif*—foresaw and decried it as a threat to those fundamental rights he sought to preserve. That there was a lack of realism in his early views is apparent from his own modification of them some thirty years later.³ Nevertheless, his original treatise deserves to rank among the "classics" on Administrative Law.

Meanwhile in this country Professor Goodnow was developing a more dispassionate and analytical approach to the subject. His two volumes on *Comparative Administrative Law*⁴ and *Principles of the Administrative Law of the United States*,⁵ published in 1893 and 1905 respectively, are early landmarks to which later writers owe much for preliminary orientation and guidance.

Tremendous impetus to the growth of administrative regulation was given during the rapid expansion of governmental activity, both in this country and in England, during the first world war. As new problems arose, new agencies were created to deal with them, born of the need for centralized control and speedy effective action. It was not until after the war emergency had passed, and government was settling into its post-crisis routine, that the law writers began taking stock of what had happened to Administrative Law in the interval since Dicey and Goodnow. Thus, in 1921 Sir Cecil T. Carr, in his *Delegated Legislation*,⁶ suggested certain safeguards which in his opinion should be adopted to protect against possible abuse of rule-making powers by English administrative agencies.

²A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, Macmillan and Co., Ltd.: London (9th ed. 1939). This, the latest edition of the original volume published in 1885, has an introduction and appendix by E. C. S. Wade.

³A. V. DICEY, *THE DEVELOPMENT OF ADMINISTRATIVE LAW IN ENGLAND* (1915) 31 L. Q. REV. 148.

⁴FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, G. P. Putnam's Sons: New York (1893).

⁵FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES*, G. P. Putnam's Sons: New York (1905).

Another early volume, a copy of which was not available to the writer, and which is therefore not cited in the text, is BRUCE WYMAN'S *THE PRINCIPLES OF ADMINISTRATIVE LAW*, Keefe-Davidson Co.: St. Paul (1903).

⁶CECIL T. CARR, *DELEGATED LEGISLATION*, Cambridge University Press: Cambridge, 1921).

W. A. Robson in 1928, in his book *Justice and Administrative Law*,⁷ re-appraised administrative tribunals in the light of what had happened since the earlier days of supremacy of the Rule of Law in England, and gave suggestions and criticisms directed mainly toward improvement in the performance of judicial functions by such agencies. In the following year, Port's *Administrative Law*⁸ offered an organization and synthesis of prior developments, in the form of a historical review and survey of administrative functions.

One of the earliest post-war volumes in this country was a collection of articles by Professor Freund and others, published in 1923 under the title *The Growth of Administrative Law*.⁹ It included discussions of historical background and constitutional aspects, as well as articles dealing with specific agencies, such as the Interstate Commerce Commission and the Federal Trade Commission. An analysis of the legislative functions of administrative agencies by Professor Comer was published in 1927.¹⁰ In the same year there appeared the critical appraisal by John Dickinson entitled *Administrative Justice and the Supremacy of Law*,¹¹ destined to rank among the leading American authorities, as was Freund's treatise on *Administrative Powers Over Persons and Property*,¹² published in the following year.

Meanwhile an increasingly vocal opposition, which took the form of an urgent plea for return to the old order, was beginning to appear. The very titles of the volumes indicate the belligerency of their authors' challenge—in England, *The New Despotism* by Lord Chief Justice Hewart,¹³ and *Bureaucracy Triumphant* by Carleton Kemp Allen;¹⁴ in America, *Our Wonderland of Bureaucracy* by former Solicitor General James M. Beck.¹⁵

⁷WILLIAM A. ROBSON, *JUSTICE AND ADMINISTRATIVE LAW*, Macmillan and Co., Ltd.: London (1928).

⁸FREDERICK J. PORT, *ADMINISTRATIVE LAW*, Longmans, Green and Co.: London (1929).

⁹ERNST FREUND *et al.*, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW*, Thomas Law Book Co.: St. Louis (1923). The several articles comprising the contents were: Ernst Freund, *Historical Survey*; Robert V. Fletcher, *The Interstate Commerce Commission*; Joseph E. Davies, *The Federal Trade Commission*; Cuthbert W. Pound, *Constitutional Aspects of Administrative Law*; John A. Kurtz, *State Public Service Commissions*; and Charles Nagel, *Federal Departmental Practice*.

¹⁰JOHN P. COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES*, Columbia University Press: New York (1927).

¹¹JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW*, Harvard University Press: Cambridge (1927).

¹²ERNST FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY*, University of Chicago Press: Chicago (1928).

¹³RT. HON. LORD HEWART, *THE NEW DESPOTISM*, Benn: London (1929).

¹⁴CARLETON K. ALLEN, *BUREAUCRACY TRIUMPHANT*, Oxford University Press: London (1931).

¹⁵JAMES M. BECK, *OUR WONDERLAND OF BUREAUCRACY*, Macmillan Co.: New York (1932).

To semanticists of a later day it might appear as though the words "bureaucracy," "despotism," and "administrative absolutism" were being used in an effort to exorcise by anathema all forms of administrative regulation. While the challenge did not accomplish this result, it did serve to direct attention to many of the dangers actually or allegedly inherent in the unrestrained development of administrative boards, bureaus, commissions, and agencies. Members of the bench and bar, political scientists, and government officials took notice to the extent of appointing committees to study and report upon the problems. These reports, the products of the investigations thus undertaken, are referred to later in this article.

During the period from 1933 to the present date there have appeared a number of books dealing with various aspects of administrative procedure as well as with administrative law generally. Among the earlier ones are such studies as that by Harold M. Stephens concerning rules of evidence before administrative tribunals,¹⁶ and the volume by John Willis on English government departments.¹⁷ This period has also witnessed the appearance of new concepts in the classification of administrative agencies according to the types of functions they perform and in the appropriate controls, either present or proposed, over administrative action. Noteworthy contributions here have been the two studies by Blachly and Oatman, the first in 1934,¹⁸ and the second in 1940,¹⁹ published under the auspices of the Brookings Institution. Approaching the subject from the point of view of the relation between public administration and administrative law are the collection of memorial essays in honor of Professor Goodnow, edited by Professors Haines and Dimock,²⁰ and the textbook on Public Administration by Professor Pfiffner.²¹ In 1938, Dean Landis presented a stalwart defense of administrative procedure, and a challenge to the critics of administrative agencies, in his much-discussed book *The Administrative Process*.²² Also worthy of special attention is the recent

¹⁶HAROLD M. STEPHENS, *ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE*, Harvard University Press: Cambridge (1933).

¹⁷JOHN WILLIS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS*, Harvard University Press: Cambridge (1933).

¹⁸FREDERICK F. BLACHLY and MIRIAM E. OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION*, Brookings Institution: Washington (1934).

¹⁹FREDERICK F. BLACHLY and MIRIAM E. OATMAN, *FEDERAL REGULATORY ACTION AND CONTROL*, Brookings Institution: Washington (1940).

²⁰CHARLES G. HAINES and MARSHALL E. DIMOCK, *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION*, Johns Hopkins Press: Baltimore (1935).

²¹JOHN M. PFIFFNER, *PUBLIC ADMINISTRATION*, Ronald Press Co.: New York (1935).

²²JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS*, Yale University Press: New Haven (1938).

compilation of six lectures delivered by Sir Cecil T. Carr at Columbia University in 1940.²³

While limitations of space preclude an enumeration of the many books dealing with particular administrative agencies and their organization, jurisdiction, and functions, there are several outstanding studies that have achieved widespread recognition. Professor Patterson's book *The Insurance Commissioner in the United States*,²⁴ the two appraisals of the Federal Trade Commission by Henderson²⁵ and Blaisdell,²⁶ respectively, and the comparison of judicial review of the Federal Trade Commission and the Interstate Commerce Commission by McFarland,²⁷ are notable examples. Of significant importance also are the excellent studies sponsored by the Commonwealth Fund, including Sharfman's five-volume treatise on the Interstate Commerce Commission,²⁸ Van Vleck's book on *The Administrative Control of Aliens*,²⁹ and Professor Dodd's analytical survey of workmen's compensation administration.³⁰

CASEBOOKS

For the organization of heterogeneous materials into definite subject-content, and for the guidance of legal analysis and understanding of its scope, the subject of Administrative Law owes a great debt to the case-books prepared for law school teaching purposes. Although the several authors may have differed in their points of approach as well as in the emphasis placed on various aspects, each has played a valuable role in shaping the thinking of law students and law teachers.

As a pioneer in the teaching of Administrative Law in the law school curriculum, Professor Freund directed attention primarily to problems of administrative powers and the securing of judicial relief against adminis-

²³CECIL T. CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW, Columbia University Press: New York (1941).

Recently published, but not available to the writer at the time this article was written, is a comprehensive two-volume treatise by F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW, Callaghan & Co.: Chicago (1941).

²⁴E. W. PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES, Harvard University Press: Cambridge (1927).

²⁵GERALD C. HENDERSON, THE FEDERAL TRADE COMMISSION, Yale University Press: New Haven (1924).

²⁶THOMAS C. BLAISDELL, THE FEDERAL TRADE COMMISSION, Columbia University Press: New York (1932).

²⁷CARL MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION, 1920-1930, Harvard University Press: Cambridge (1933).

²⁸ISAIAH L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, Commonwealth Fund: New York (1931-1937).

²⁹WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS, Commonwealth Fund: New York (1932).

³⁰WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, Commonwealth Fund: New York (1936).

trative action.³¹ His basic concern was with the matter of remedies, and he drew his materials largely from state court decisions illustrating the various actions and proceedings available to review or to obtain redress for official action affecting the individual citizen.

Professors Frankfurter and Davison chose a different approach.³² Using for the most part decisions of the United States Supreme Court, they emphasized such constitutional aspects as the separation and delegation of powers, and judicial control of administrative action. In dealing with the latter, they recognized the difficulty of horizontal classification, namely, that the extent of judicial review necessary or suitable for one type of agency may not apply to other types of agencies. Hence they subdivided the subject of judicial review according to various fields of administrative action such as utility regulation, taxation, control of aliens, and similar topics.

The later casebooks have tended to place more stress on the problems of administrative procedure, viewing administrative action in its chronological sequence from the initial creation or establishment of agencies, through the successive stages and elements of the administrative proceeding, and thence to problems of judicial review and control. Professor Stason³³ and Professor Gellhorn³⁴ have made particular use of this approach and have drawn widely, not only from state and federal court decisions, but also from statutes, rules, committee reports, textbooks, law review articles, and agency decisions. Each of these two casebooks contains a comprehensive bibliography of reading and reference materials on Administrative Law.³⁵ Professor Maurer's casebook³⁶ combines the same basic elements in more condensed form, with less extensive use of non-judicial materials, and Professor Sears³⁷ devotes somewhat more consideration to the problems of specific remedies as well as to the responsibilities of officers and governments for official action. The recent book by Professor Hart³⁸ is a combination of text material and case excerpts, designed for the teaching of Administrative Law to undergraduate students

³¹ERNST FREUND, *CASES ON ADMINISTRATIVE LAW*, West Publishing Co.: St. Paul (2d ed. 1928). The first edition was published in 1911.

³²FELIX FRANKFURTER and J. FORRESTER DAVISON, *CASES AND MATERIALS ON ADMINISTRATIVE LAW*, Foundation Press: Chicago (2d ed. 1935). The first edition was published in 1932.

³³E. BLYTHE STASON, *THE LAW OF ADMINISTRATIVE TRIBUNALS*, Callaghan & Co.: Chicago (1937).

³⁴WALTER GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS*, Foundation Press: Chicago (1940).

³⁵STASON, *op. cit. supra* at xix-xxv; GELLHORN, *op. cit. supra* at li-lxxii.

³⁶ROBERT A. MAURER, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW*, Lawyers' Co-operative Publishing Co.: Rochester, N. Y. (1937).

³⁷KENNETH C. SEARS, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW*, West Publishing Co.: St. Paul (1938).

³⁸JAMES HART, *AN INTRODUCTION TO ADMINISTRATIVE LAW*, F. S. Crofts & Co.: New York (1940).

of political science and public administration, and with more preliminary emphasis on the powers and duties of public officers.

COMMITTEE REPORTS

The several polemics against the growth of administrative "bureaucracy" have, as previously mentioned, stimulated attention and action, both in this country and in England. Among the committees appointed to study and make recommendations for the reform of administrative regulatory action and procedure, there are four in particular whose reports have attracted general interest and have provoked widespread comment, both favorable and otherwise. These reports are well worth studying by the lawyer seeking to inform himself on recent developments and current problems in Administrative Law. The four committees in question, in the sequence of their creation, are the Committee on Ministers' Powers in England, the Committee on Administrative Law of the American Bar Association, the President's Committee on Administrative Management, and the Attorney General's Committee on Administrative Procedure. Each has produced a report, or series of reports, embodying certain proposals for reform.

The reforms suggested differ considerably both as to objectives and as to methods by which the objectives are to be attained. In general it may be said that the respective proposals tend toward one or another of the following goals: (1) strengthening of legislative control over, and responsibility for, administrative action; (2) strengthening of judicial control over administrative action; (3) centralization of executive control over administrative organization; and (4) internal reform of administrative organization and procedure. To designate the last three of these concepts, Blachly and Oatman have suggested the terms "doctrine of the judicial formula," "doctrine of executive management," and "revisionist doctrine."³⁹

The Committee on Ministers' Powers was appointed by the Lord High Chancellor in 1929 to study the sub-legislative and quasi-judicial powers exercised by Ministers of the Crown and by agencies under their direction, and "to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law."⁴⁰ The results of this study, together with

³⁹BLACHLY and OATMAN, *FEDERAL REGULATORY ACTION AND CONTROL*, Brookings Institution: Washington (1940) 3.

⁴⁰COMMITTEE ON MINISTERS' POWERS—REPORT (Cmd. 4060). H. M. Stationery Office: London (1932) 1. This is sometimes referred to as the "Sankey Committee" report.

the recommendations based thereon, were published in 1932, and included, among other proposals, suggested safeguards against administrative abuse of the rule-making power by limiting the extent of its delegation and by increasing the responsibility of Parliament for the supervision of its exercise.

The American Bar Association's Special Committee on Administrative Law was created in 1933, and has presented each year to the Association a report containing proposals for reform or for further study.⁴¹ While these proposals have varied somewhat from year to year, they have included such recommendations as centralized publication of rules, regulations, decisions, and orders of administrative agencies,⁴² the establishment of a Federal Administrative Court,⁴³ the prevention of political pressure to influence administrative decisions,⁴⁴ the extension of civil service to lawyers engaged in the quasi-judicial work of administrative agencies,⁴⁵ and the regulation of practice before such agencies.⁴⁶ Most significant and most widely discussed were the proposals for the reform of federal administrative procedure, providing for judicial review of administrative rules and regulations, and extending the scope of judicial review of administrative decisions.⁴⁷ These proposals culminated in the Walter-Logan Bill, passed by the Congress in 1940, and vetoed by the President.⁴⁸

The report of the President's Committee on Administrative Management included a series of special studies in monograph form, dealing with various aspects of organization and management in the federal government.⁴⁹ Of these, at least two are of special interest to lawyers be-

⁴¹These reports are printed in the annual volumes of "Reports of the American Bar Association" beginning with vol. 58 (1933); see (1933) 58 A. B. A. REP. 407. There was no formal committee report in 1935, but the statement of the chairman of the committee for that year appears in (1935) 60 A. B. A. REP. 136. In 1939 there was a separate report of a Committee on Administrative Agencies and Tribunals; see (1939) 64 A. B. A. REP. 407.

⁴²59 A. B. A. REP. (1934) 539.

⁴³60 A. B. A. REP. (1935) 136; 61 A. B. A. REP. (1936) 720.

⁴⁴61 A. B. A. REP. (1936) 720; 62 A. B. A. REP. (1937) 789.

⁴⁵62 A. B. A. REP. (1937) 789; 63 A. B. A. REP. (1938) 331; 66 A. B. A. REP. (1941) 215.

⁴⁶66 A. B. A. REP. (1940) 215.

⁴⁷63 A. B. A. REP. (1938) 331; 64 A. B. A. REP. (1939) 575.

⁴⁸S. 915, 76th Cong. (1940).

⁴⁹REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *Administrative Management in the Government of the United States*, United States Government Printing Office: Washington (1937). In addition to this report, there were five separate monographs: No. I, *Personnel Administration in the Federal Service*; No. II, *Fiscal Management in the National Government*; No. III, *The Problem of the Independent Regulatory Commissions*; No. IV, *Problems of Administrative Management*; and No. V, *The Exercise of Rule-Making Power and the Preparation of Proposed Legislative Measures by Administrative Departments*.

cause of their relationship to the legal problems of administrative regulation and the procedure of administrative agencies. One is Cushman's report on *The Problem of the Independent Regulatory Commissions*,⁵⁰ suggesting that as to functions of administration and determination of policy such agencies should be more directly under the control of the President, retaining their independence only for functions of adjudication. The other is the report by Hart and Witte entitled *The Exercise of Rule-Making Power and the Preparation of Proposed Legislative Measures by Administrative Departments*.⁵¹

Latest of the four committees, and one whose report seems destined to command attention equal to, if not greater than, that attracted by the other three, is the Attorney General's Committee on Administrative Procedure. Appointed at the request of the President "to investigate the need for procedural reform in various administrative tribunals and to suggest improvements therein," the committee undertook its work by making a thoroughgoing study of the organization and procedure of a number of federal agencies, the results of which study were published in a series of 27 monographs.⁵² The final report, published in January, 1941, includes a detailed review of the results of the Committee's investigation, and a proposed bill to carry the recommendations into effect.⁵³ In general, the proposed reforms pertain more to the internal organization and opera-

⁵⁰Monograph No. III, *supra*.

⁵¹Monograph No. V, *supra*.

⁵²The following list of monographs indicates the extensiveness of the committee's investigations: (1) *The Walsh-Healey Act* (Division of Public Contracts, Department of Labor); (2) *The Veterans' Administration*; (3) *Federal Communications Commission* (2 vols.); (4) *United States Maritime Commission*; (5) *Federal Alcohol Administration*; (6) *Federal Trade Commission*; (7) *The Administration of the Grain Standards Act—Department of Agriculture*; (8) *Railroad Retirement Board*; (9) *The Federal Reserve System*; (10) *Department of Commerce—Bureau of Marine Inspection and Navigation*; (11) *The Administration of the Packer's and Stockyards Act—Department of Agriculture*; (12) *Administration of the Fair Labor Standards Act of 1935—Wage and Hour Division—Children's Bureau* (2 vols.); (13) *Post Office Department*; (14) *Federal Control of Banking—Comptroller of the Currency and Federal Deposit Insurance Corporation*; (15) *War Department*; (16) *Social Security Board*; (17) *Railway Labor—The National Railroad Adjustment Board and the National Mediation Board*; (18) *National Labor Relations Board*; (19) *The Civil Aeronautics Authority* (2 vols.); (20) *Department of the Interior*; (21) *United States Employees' Compensation Commission*; (22) *Administration of the Internal Revenue Laws—Bureau of Internal Revenue—Board of Tax Appeals—Processing Tax Board of Review* (2 vols.); (23) *Bituminous Coal Division—Department of Interior* (2 vols.); (24) *Interstate Commerce Commission* (2 vols.); (25) *Federal Power Commission*; (26) *Securities and Exchange Commission*; (27) *Administration of the Customs Laws* (vol. 1, United States Tariff Commission; vol. 2, Bureau of Customs, Department of the Treasury).

⁵³*Administrative Procedures in Government Agencies*, SEN. Doc. No. 8, 77th., Cong., 1st Sess. (1941). The report has been reprinted under the title FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, United States Government Printing Office: Washington (1941). It is sometimes referred to as the "Acheson Committee" report.

tion of the agencies than to the strengthening of external controls. The report contains a separate statement of views and recommendations by three members of the committee, proposing a code of standards of fair administrative procedure,⁵⁴ and a further separate statement of views by one member.⁵⁵ The report in its entirety is worthy of careful study by every lawyer interested in the field of Administrative Law.

MANUALS AND CURRENT SERVICES

Several handbooks or reference manuals, usually in the form of compilations or classifications of available data concerning administrative agencies or their functions, have been published. One of the earliest was a compendium of digests of federal court cases involving the review of determinations of federal departments, officers, and administrative agencies.⁵⁶ A study outlining the structure and functions of the newer federal agencies was published by the Brookings Institution in 1934.⁵⁷ In the same year, the United States Information Service was established by the National Emergency Council and thereafter published the first Government Manual, in the form of a loose-leaf service giving brief data as to the organization, functions, and personnel of the agencies, offices, and departments of the federal government.⁵⁸ This original loose-leaf service has been superseded by bound volumes appearing from time to time, the latest having been published in September, 1941.⁵⁹ Other publications in the category of manuals include a volume of selected rulings and regulations of federal departments and agencies,⁶⁰ and a reference manual containing information as to each of the various divisions and agencies of the federal government.⁶¹ Of considerable value to lawyers dealing with federal administrative agencies is the new *Code of Federal Regulations*,⁶² prepared and published in accordance with the requirements of the Federal Register Act.⁶³

⁵⁴*Id.* at 203, 217.

⁵⁵*Id.* at 248.

⁵⁶PATRICK H. LOUGHRAN, *JUDICIAL REVIEW OF FEDERAL EXECUTIVE ACTION*, Michie Co.: Charlottesville, Va. (1930).

⁵⁷LAURENCE F. SCHMECKEBIER, *NEW FEDERAL ORGANIZATIONS*, Brookings Institution: Washington (1934).

⁵⁸UNITED STATES GOVERNMENT MANUAL, National Emergency Council: Washington (1935).

⁵⁹UNITED STATES GOVERNMENT MANUAL—September 1941, United States Information Service: Washington (1941).

⁶⁰ADMINISTRATIVE INTERPRETATIONS, Bureau of National Affairs: Washington (1937).

⁶¹THEODORE W. GRASKE, *FEDERAL REFERENCE MANUAL*, National Law Book Co.: Washington (1939). This book is kept up-to-date by a pocket supplement.

⁶²THE CODE OF FEDERAL REGULATIONS OF THE UNITED STATES OF AMERICA (14 vols.), United States Government Printing Office: Washington (1939).

⁶³49 STAT. 501 (1935), 44 U. S. C. A. § 305 (1941).

Among the current publications which are useful in keeping the lawyer abreast of the latest developments, mention should be made of two in particular. The first is the *Federal Register*,⁶⁴ the official daily publication containing executive and administrative orders, rules, regulations, and notices. The second is *United States Law Week*⁶⁵ which furnishes weekly information concerning federal administrative interpretations and decisions as well as judicial decisions and statutes affecting administrative agencies.

Two comprehensive loose-leaf services on federal administrative law and procedure have recently made their appearance. One adopts the horizontal approach, collecting together all available materials pertaining to various aspects and stages of the administrative process.⁶⁶ It includes digests of cases and law review articles, and its contents are classified and indexed according to a detailed key-numbering system. The other classifies the material on an agency-by-agency basis, presenting for each agency the statutory provisions concerning its jurisdiction and functions, together with excerpts from the report and memoranda of the Attorney General's Committee on Administrative Procedure.⁶⁷ Both are kept up-to-date by supplemental page replacements and additions.

LAW REVIEW SYMPOSIA

As previously stated, individual articles, comments, and case-notes pertaining to administrative law and procedure have appeared in increasing numbers in the law reviews and legal periodicals. Even if one reviewer were competent to appraise them all, an enumeration of those which seemed to him to have special merit would unfairly omit others of equal worth. However, one type of law review presentation of material should be noted.

In keeping with the recent trend toward offering in a single issue a number of articles or addresses dealing with various aspects of the same subject, several of the law reviews and journals have presented symposia on Administrative Law. Thus, the issue of the *American Law School Review* for April, 1939, reprints various views on the feasibility of applying to different administrative agencies uniform requirements for a fair administrative hearing.⁶⁸ A collection of papers presented by participants in a symposium held in 1939 was published in the *George*

⁶⁴FEDERAL REGISTER, United States Government Printing Office: Washington.

⁶⁵THE UNITED STATES LAW WEEK, Bureau of National Affairs: Washington.

⁶⁶JAMES A. PIKE and HENRY G. FISCHER, ADMINISTRATIVE LAW: REPORTER—SERVICE—TEXT (2 vols.), Matthew Bender & Co.: Albany, N. Y. (1941).

⁶⁷COMMERCE CLEARING HOUSE, FEDERAL ADMINISTRATIVE PROCEDURE (3 vols.) Commerce Clearing House: New York, Chicago & Washington (1941).

⁶⁸*Symposium on Administrative Law* (1939) 9 AM. L. SCHOOL REV. 139. The views presented include those of Ralph F. Fuchs, J. Warren Madden, Chester T. Lane, Elmer A. Smith, Ralph Horween, Ray A. Brown, and James M. Landis.

Washington Law Review for April of that year.⁶⁹ In its February 1940 issue, the *Illinois Law Review* contained a symposium on the American Bar Association's proposed administrative law bill.⁷⁰ The *Iowa Law Review* for March, 1940, offered a group of articles on procedural administrative law,⁷¹ and in April of the same year, the *Washington University Law Quarterly* reprinted the proceedings of a symposium on administrative law and procedure.⁷² There have been collections of articles and comments on the report of the Attorney General's Committee on Administrative Procedure in the *American Bar Association Journal* for March, 1941,⁷³ and in the *Columbia Law Review* for April, 1941.⁷⁴

Such collective presentation of various points of view or of various phases of the subject is a useful development. It is to be hoped that more will be forthcoming, each adding its measure to the knowledge and understanding of the problems of Administrative Law.

⁶⁹*Administrative Law Symposium* (1939) 7 GEO. WASH. L. REV. 689: J. Forrester Davison, *What Is Administrative Law?*; E. Blythe Stason, *Study and Research in Administrative Law*; Clyde B. Aitchison, *Reforming the Administrative Process*; Kenneth C. Sears, *The Morgan Case and Administrative Procedure*; Louis G. Caldwell, *Comments on the Procedure of Federal Administrative Tribunals, With Particular Reference to the Federal Communications Commission*; William J. Dempsey, *The New Rules of Procedure of the Federal Communications Commission*.

⁷⁰*American Bar Association's Administrative Law Bill—A Symposium* (1940) 34 ILL. L. REV. 641: J. Forrester Davison, *Administrative Legislation*; Breck P. McAllister, *Administrative Adjudication and Judicial Review*; Chester T. Lane and Robert M. Blair-Smith, *The S. E. C. and the "Expeditious Settlement of Disputes."*

⁷¹*Symposium on Procedural Administrative Law* (1940) 25 IOWA L. REV. 421: Walter Gellhorn, *Introduction*; Arthur W. Macmahon, *The Ordeal of Administrative Law*; Robert B. Hankins, *The Necessity for Administrative Notice and Hearing*; Louis L. Jaffe, *The Individual Right to Initiate Administrative Process*; Charles S. Hyneman, *State Administrative Tribunals and "Fair Play"*; J. Forrester Davison, *Use of Public Documents and Reports in Administrative Proceedings*; Frederick F. Blachly and Miriam E. Oatman, *Federal Statutory Administrative Orders*.

⁷²*Proceedings of the Symposium on Administrative Law and Procedure* (1940) 25 WASH. U. L. Q. 305: Joseph A. McClain, Jr., *Opening Remarks*; A. H. Feller, *Administrative Procedure and the Public Interest—The Results of Due Process*; Henry Wolfe Bikle, *Safeguarding Private Interest in Administrative Procedure*; Ashley Sellers, *Administrative Procedure—A Suggested Classification of Procedures of Regulatory Agencies in the United States Department of Agriculture*; Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*; Ralph F. Fuchs, *Conclusion*.

⁷³*Administrative Law Symposium* (1941) 27 A. B. A. J. 133: Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*; *Analysis of the Bills Accompanying Report of the Attorney General's Committee*; *Summary of Attorney General's Committee Report by Dean Acheson, Chairman*; *Additional Views and Recommendations of Messrs. McFarland, Stason and Vanderbilt*; *Additional Views and Recommendations of Chief Justice Groner*; O. R. McGuire, *Administrative Procedure Reform Moves Forward*.

The issue of the *Journal* for April, 1941, contained a further symposium of comments by O. R. McGuire, Lloyd K. Garrison and Arthur T. Vanderbilt. See *Administrative Law Symposium II* (1941) 27 A. B. A. J. 207.

⁷⁴*The Final Report of the Attorney General's Committee on Administrative Procedure* (1941) 41 COL. L. REV. 585: Felix Frankfurter, *Foreword*; A. H. Feller, *Administrative Law Investigation Comes of Age*; John Foster Dulles, *The Effect in Practice of the Report on Administrative Procedure*; J. Forrester Davison, *Administrative Technique—The Report on Administrative Procedure*.

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NOTES AND COMMENTS

TAXPAYER'S REMEDIES IN MISSISSIPPI FOR IMPROPER ASSESSMENT OF HIS PROPERTY

Administrative Remedies Before the Board of Supervisors

When an erroneous assessment has been made in regard to a taxpayer's property several remedies are available by which he may seek to have the assessment corrected. It is the purpose of this paper to set out and explain these various remedies.

The first and probably the most important of these remedies is the administrative remedy before the board of supervisors. In order to understand just how this remedy is afforded it may be well to set out the procedure by which this assessment is formulated. This procedure is somewhat complicated and indefinite as to certain parts, but briefly it may be stated as follows:¹ The tax assessor must complete and deliver the assessment roll to the clerk of the board of supervisors on or before the first Monday in July, at which time the board of supervisors must equalize the assessments; and at its next, or August, meeting the board hears and determines the objections of the taxpayers thereto. A recapitulation of the assessments of the various classes of property, as equalized, must then be transmitted by the board of supervisors to the state tax commission by September first. The recapitulation must then be examined by the state tax commission, and if it appears therefrom that the assessments of all of the various classes of property are correct, it shall be approved by the state tax commission, in writing, transmitted to the board of supervisors, and entered by the board on its minutes. If it appears from this recapitulation that the assessment of any class of property is too high or too low, the state tax commission orders the board of supervisors, in writing, to raise or lower the assessment thereof. On receipt of this order, the board of supervisors must raise or lower the assessments in accordance with the instructions of the state tax commission, after having first corrected any errors in the former equalization thereof. When the order of the state tax commission approving the recapitulation of the assessment roll has been entered on the minutes of the board of supervisors, or the order of the state tax commission to increase or lower the assessments of any class of property has been complied with by the board, the clerk of the board must then make two copies of the roll and transmit one to the state tax commission for its final approval. The effect of the procedure

¹If in assessing property for taxes either the requirement in the constitution that property be assessed at its true value, or the requirement that its assessment be uniform and equal, is to be sacrificed, it must be the former, and not the latter, as otherwise it would deprive the taxpayer of equal protection of law guaranteed by the fourteenth amendment of the Federal Constitution. In the case of *Knox v. Southern Paper Co.*, 143 Miss. 870, 879, 108 So. 288, 290 (1926) the court stated: "Where there is a systematic scheme to assess property for taxes generally below its true value, a taxpayer whose property is assessed at full value is thereby deprived of equal protection under the fourteenth amendment of the Federal Constitution. It is a matter of common knowledge in this state that the assessing officers of the state systematically and universally assess property in the state at a lower level than its true value."

from this point is a matter of controversy and will be explained in detail in a subsequent part of this paper.

As can be readily seen, the many steps in this procedure give rise to numerous problems, and many of them have not as yet been definitely settled.

It is provided in the code sections² that notice of the assessment is to be given to the taxpayer in time for him to appear at the August meeting and file an objection to his assessment, if he is dissatisfied. At this August meeting the board is to sit from day to day until the objections shall have been disposed of, and all proper corrections made. In construing this provision the Supreme Court has held that a notice stating that "any objection to any assessment contained in said revised rolls must be made in writing and filed with the clerk of this board on or before the first Monday of August, 1930, at his office in the courthouse of said county, and that any and all assessments to which no objection is then and there made will be final" sufficiently complies with this section. The court stated: "We are of the opinion that this statute only requires the notices to state that the assessment rolls have been equalized and are ready for inspection and examination."³

The court then goes on to hold that the stipulation that objections must be filed in writing on or before the first Monday of August was mere surplusage which could not have deceived any taxpayer as to the time and place when and where the final judgment is to be entered. The first Monday of August is the only day that the taxpayer can be assured he will have opportunity to file his objections, since it might occur that no taxpayers would appear to object to assessments, in which event only a few hours would be necessary to complete the performance of this duty.⁴

If the notice given is not complete or does not comply with the terms of the statute,⁵ then the assessment is void and no action need be taken by the taxpayer. One exception to this requirement is actual notice and appearance before the board to contest the validity of the assessment by the taxpayer. In such case the taxpayer cannot allege a want of notice. The failure to give notice was cured by his voluntary appearance.⁶

Since the board of supervisors, in making the assessments, acts as a court of limited jurisdiction, all the facts necessary to give it jurisdiction of this particular matter must appear in its records.⁷ Thus the record must

²MISS. CODE ANN. (1930) §§ 3161, 3162, 3166.

³Rawlings v. Ladner, 174 Miss. 611, 622, 165 So. 427, 429 (1936).

⁴Although, as has been seen, in certain cases it is necessary for the taxpayer to file his objection before he can appeal, this is not true of the State. In Robinson Land and Lumber Co., v. Roberson, 126 Miss. 535, 559, 89 So. 160, 161 (1921) the court stated: "The statute granting the attorney general the right of appeal does not require him to file objections before the board; the provisions with reference to filing objections applies only to persons, taxpayers, and not to the state." The court then proceeds to hold that this act is constitutional.

⁵MISS. CODE ANN. (1930) § 3162 provides that the notice must be by newspaper publication.

⁶Horne v. Green, 52 Miss. 452 (1876).

⁷Henderson Molpus Co. v. Gammill, 149 Miss. 576, 115 So. 716 (1928).

of necessity show that the requisite notice was given or that actual notice was received by the taxpayer plus his appearance before the board to contest the validity of the assessment.⁸ Even though the proper notice was given, still the publication of this notice is a jurisdictional fact and must appear on the record of the board. If the publication does not appear on the record, then the assessment is void, and no extrinsic evidence is admissible to show that the notice was actually given.⁹

If the proper notice of the assessment roll is given by the board and the taxpayer fails to appear at the August meeting and file his objection, then, with certain exceptions,¹⁰ it seems that as to the taxpayer, the assessment becomes final. However, the board is given certain powers in regard to changing individual assessments after it has adjourned the objection meeting,¹¹ which powers will be explained in a later portion of this paper.

Before the passage of section 3178, Code of 1930, it was the general rule that when the board met to correct, change and alter the rolls, it should remain on the job until it was completed. If the board adjourned before the changes were actually made on the roll, then it no longer possessed the authority to make changes in assessments.¹²

This is no longer the rule since the passage of this section, but it may still be significant in that the power of the board to make changes in the assessment roll after the adjournment of the August meeting, is derived solely from the express provisions in this section, and unless it acts in compliance with this section, then the board does not have this power.¹³

In this section it is provided that the board must carry out the orders of the state tax commission. It is further provided that:

"In carrying out the orders of the state tax commission the board of supervisors shall first, correct any errors in their former equalization and may add to the roll any person or property found to be omitted and then shall apply the percentage of increase or decrease as ordered by the state tax commission to the respective class or classes of property; but the board shall not apply an increase to the assessment of all taxpayers owning any class of property affected by the order of the tax commission until it has first corrected all errors in its former equalization to the end that no particular parcel of property within a class shall be

⁸Horne v. Green, 52 Miss. 452 (1876); Rawlings v. Ladner, 174 Miss. 611, 165 So. 427 (1936).

⁹Henderson Molpus Co. v. Gammill, 149 Miss. 576, 115 So. 716 (1928).

It is also held in Pettibone v. Wells, 181 Miss. 425, 179 So. 336 (1938) that the recital in the record that the publication of the notice had been made is a jurisdictional fact, but that the proof of the publication is only an evidentiary fact, showing the board that its direction had been complied with.

¹⁰Miss. CODE ANN. (Supp. 1938) § 3191.

¹¹Miss. CODE ANN. (1930) § 3178.

¹²Board of Supervisors of Covington Co. v. Conner Lumber Co., 107 Miss. 368, 65 So. 466 (1914).

¹³This reasoning is also true in regard to the power of the state tax commission in making changes in the assessments. Board of Supervisors of Jones Cty. v. Laurel Mills, 130 Miss. 454, 94 So. 448 (1922).

raised above its actual value when the required percentage of increase is applied to that class. The revised and corrected property valuations thus made shall be the fixed and legal valuation of the property for the payment of taxes, and it shall be the duty of each and every taxpayer to pay his taxes thereon accordingly."

Although exactly how much power this statute gives to the board in this regard has not been decided, it would seem that it is very broad. Since the board can change any individual assessment of its own initiative in order that all property of the same value shall be assessed at its true value and for an equal amount¹⁴ it would seem that the board could merely state that the present assessment is incorrect, constituting an error in the first equalization meeting, and then proceed to make any change that it desires. Thus, if the taxpayer can convince the board that his assessment is erroneous, then the board can make the correction at this time.

One question that this section does not settle is whether or not the board still has this power even though the commission approves the assessment roll without change. It would seem from the wording of the section that the board would not have this power unless such a change was ordered.

For these reasons it can be seen that the taxpayer should take it upon himself to investigate the assessment roll *before* the August meeting. If the required notice is posted in a proper paper, then the fact that the taxpayer did not actually receive a copy of the paper or did not have actual notice of the fact that the assessment roll was ready for inspection is of no importance.¹⁵ Under these circumstances, if he fails to make an objection he "shall be concluded by the assessment and precluded from questioning its validity after its final approval by the board of supervisors or by operation of law, except minors and persons non compos mentis."¹⁶

Just what is meant here by "final approval by the board of supervisors or by operation of law" is not clear. However it would seem that these phrases are practically synonymous and refer to the assessment becoming final.

If this is the proper interpretation to place upon the statute, then it would seem possible that the taxpayer could appear before the board and object to an assessment and the board would have power to make the change at any time before its final approval. This seems to follow from the statute; however, this procedure would be somewhat dangerous, since, as has been shown, it seems that the board does not have power to make any changes in the roll when the commission approves it without ordering a single revision.

The safest procedure for the taxpayer to follow if he desires to object to his assessment, would be for him to file an objection with the board

¹⁴Wray v. Cleveland State Bank, 134 Miss. 41, 98 So. 442 (1924).

¹⁵North American Old Roman Catholic Diocese v. Havens, 164 Miss. 119, 144 So. 473 (1932).

¹⁶MISS. CODE ANN. (1930) § 3166.

during the August meeting. By so doing he may be able to get the board to make the requested changes immediately, or at any time before its final approval of the roll.

Appeal

If the board of supervisors refuses to make the requested changes, then in section 3179, Code of 1930, it is provided:

"Any taxpayer who feels aggrieved at the action of the board of supervisors in equalizing his assessments shall have the right of appeal to the circuit court in the manner provided by law, within ten days after the adjournment of the meeting of the board of supervisors, at which the approval of the roll by the state tax commission is entered."

However, before the taxpayer can take advantage of this section and appeal to the circuit court, he must have filed a written objection with the board during the August meeting. This requirement, that the objection must be written before the taxpayer can appeal, is one that is strictly adhered to by the courts. Appearance before the board by the taxpayer plus an oral objection to the assessment, is not a sufficient basis upon which to found an appeal under this section.¹⁷

This requirement, that the objection must be in writing, applies only to the objections to the assessment as returned by the assessor, or as changed by the board at its July meeting. In fact, the only time that the taxpayer need object at all before appealing is where the assessment made by the assessor, or as changed by the board at the July meeting, remains unchanged.¹⁸ If the change is made at the August or subsequent meeting no such objection is necessary.

¹⁷Adams County v. Bank of Commerce in Liquidation, 157 Miss. 249, 128 So. 110 (1930).

¹⁸In Simmons v. Board of Supervisors of Scott Cty., 68 Miss. 37, 8 So. 259 (1890) it was held that section 3166, Code of 1930, had no application to cases where land had been properly valued on the roll in the first instance and if the board at the August meeting raised the valuation, the right to apply afterwards for a reduction was not lost by a failure to appeal in accordance with that statute.

In Louis Cohn & Bros. v. Lincoln County, 119 Miss. 718, 81 So. 492 (1919) the appellee contended that no appeal would lie from a decision of a board of supervisors by which the valuation made by the assessor of property was increased, unless the person aggrieved by the decision objected in some way thereto. It was held that this contention was without merit for the reason that section 81, Code of 1906 (section 62, Code of 1930) under which the appeal was taken, provided that "any person aggrieved by the decision of the board of supervisors may appeal . . ." and not that any person aggrieved by a decision of the board of supervisors and who has objected thereto, may appeal. The section invoked by the appellee (section 3166, Code of 1930) dealt only with the assessment roll as returned by the assessor and not with the increases in the valuation of the property therein assessed made by the board in subsequent meetings.

In Adams County v. Bank of Commerce in Liquidation, 157 Miss. 249, 251, 128 So. 110, 111 (1930) the court stated: "If the board had increased the assessment at the August meeting or any subsequent meeting, then the taxpayer could appeal without objection, either in writing or orally, for there it would not be the assessment returned by the assessor and prepared by the board for hearing at the August meeting which would be the point of objection, but would be the increase on that assessment."

A similar distinction applies to the notice given by the board in section 3165, Code of 1930, it is provided that where the board increases an individual assessment at the August meeting "... immediate notice in writing shall be sent by mail to the person whose assessment is increased by the clerk of the board of supervisors." The courts apply this section strictly to the August meeting and no such notice is required where the change is ordered at the July meeting.¹⁹ This is because the publication of the notice that the rolls are ready for inspection by the taxpayer gives sufficient notice of any change made during this meeting. Nor does notice of the increase in the assessment have to be given the taxpayer when the board is only carrying out the orders of the tax commission in making the increase.²⁰

Regardless of whether the taxpayer objects to the assessment roll as changed, approval by the board amounts to *res adjudicata* in regard to the roll. The action of the board in increasing or decreasing an assessment can only be questioned by a direct appeal by a party interested, and if no appeal is prosecuted, then the action by the board is *res adjudicata*. If the board has finally approved the assessment roll and the time for appeal has elapsed, then mere irregularities in the assessment, such as misdescription, excessive valuation, listing of property to the wrong person, and the like, cannot be availed of by collateral attack. The only basis upon which the assessment can then be attacked is that of fraud.²¹ Of course, if some jurisdictional fact is lacking then the entire assessment is completely void.²²

The approval of the assessment, so far as respects *res adjudicata*, rests upon the same basis as other judgments. Thus, he who claims the approval as *res adjudicata* must show that all of his taxable property was passed

¹⁹In *Day Bros. v. Board of Supervisors of Webster Cty.*, 183 Miss. 240, 247, 184 So. 453, 454 (1938) the court stated: "We are of the opinion however that the notice required to be given by said section, where an individual assessment has been increased, applies only to increases made at the August meeting. Prior thereto the taxpayer has already been notified by publication that the rolls have been equalized and are ready for inspection and examination. If, upon examination and inspection of the rolls, the taxpayer finds that his assessment as given in to the assessor has been increased, he is given an opportunity to appear at the August meeting and file objections in writing thereto. If he finds that his assessment has not been increased he may rely upon such fact and file no objections. Then, if, at the August meeting, the board shall, while the taxpayer is relying on the roll as heretofore equalized, increase his assessment, he is entitled to immediate notice thereof in writing, sent to him by mail, as provided for in section 3165."

²⁰*Id.* at 249, 184 So. at 455, the court stated: "As regards the objection to the validity of the increase in the assessment which was made pursuant to the order of the state tax commission we think it clear that the notice by mail mentioned in section 3185 is required only where a new assessment is found to be necessary when the board of supervisors examines the assessment roll at its July meeting, due to the assessor being incapable or his assessment being so imperfect that it should not be approved, whether objections thereto be filed or not, and where the board is authorized to appoint some suitable person to thereafter proceed to make the new assessment as provided in section 3184."

²¹*Vicksburg Bank v. Adams*, 74 Miss. 179, 21 So. 401 (1896); *Yazoo Delta Lumber Co. v. Eastland*, 104 Miss. 553, 61 So. 597 (1913); *Wray v. Cleveland State Bank*, 134 Miss. 41, 98 So. 442 (1924).

²²If the board of supervisors does not have jurisdiction of the property involved, then it cannot assess it for taxes. *Warren Cty. v. Mississippi River Ferry Co.*, 170 Miss. 183, 154 So. 349 (1934).

upon by the board; property not brought to the attention of the board is not assessed at all by a judgment of approving an assessment of other property. Nor is the approval of the assessment by the board conclusive that the taxpayer has listed, or that the roll contains, all of the taxable property owned by him. Such an approval, no fraud being present, is still only conclusive as to the validity of the assessments as against the taxpayer, and as against the taxpayer and the public, that the value of the enumerated property is correctly given.²³ If the property is listed and is valued by the assessor and board of supervisors, the judgment of the board is conclusive—is *res adjudicata*—unless someone entitled to do so appeals from the judgment of the board. Where the board has the question of value properly before it for decision, and decides upon the value of the property assessed, this judgment may not be questioned, except by appeal to the circuit court.²⁴

Sections 62 and 3179, Code of 1930, provide that the taxpayer has "ten days after the adjournment of the meeting of the board of supervisors, at which the approval of the roll by the state tax commission is entered," in which to appeal to the circuit court.²⁵ The principal problem presented in this procedure is when these ten days start running against the taxpayer.

The courts in interpreting the terminology of this statute have uniformly held that it means within ten days after the assessment is made "final."²⁶ The question then presented is what is meant by "final."

The decisions are uniform, and it is clearly covered by the terminology of the statute, that no assessment is "final" until after the report of the tax commission on its examination of the recapitulations submitted to it by the various counties has been given to the board of supervisors. But, from this point on, the decisions are considerably confused as to just when the assessment does become "final."

²³Adams v. Clarke, 80 Miss. 134, 31 So. 216 (1902).

²⁴Bank of Oxford v. Lafayette Cty., 79 Miss. 152, 29 So. 825 (1901).

An interesting problem in this regard is presented in Darnell v. Johnston, 109 Miss. 570, 68 So. 780 (1915), and Gully v. Newman Lumber Co., 176 Miss. 48, 164 So. 891 (1936). In the former case it was held that where timbered land was arbitrarily assessed as untimbered land, this was not *res adjudicata* as regarding the timber, and that it had escaped taxation. Judge Smith dissented on the ground that this assessment amounted to a valuation of nothing being placed on the timber, which the board could do, and that, therefore, the assessment could only be questioned by direct appeal on this point, brought in time, etc.

In the latter case the land in question was assessed as "uncultivable" land. It was held that Darnell v. Johnston was not controlling under these facts and that this assessment amounted to an adjudication that the land contained no taxable timber, precluding assessment of timber for back taxes. The emphasis of the decision was placed on the fact that the assessment roll assessed the land as "uncultivable."

²⁵It is held that, insofar as the question involved in these cases is concerned, these two statutes are identical. Edward Hines Yellow Pine Trustees v. State, 146 Miss. 101, 112 So. 12 (1927).

²⁶Madison Cty. v. Frazier, 78 Miss. 880, 29 So. 765 (1901); State v. Wheatley, 113 Miss. 555, 74 So. 427 (1917); Mobile & Ohio R. R. v. Board of Supervisors of Wayne Cty., 124 Miss. 655, 87 So. 139 (1920); Moller-Vandenboom Lumber Co. v. Board of Supervisors of Attalla Cty., 135 Miss. 249, 99 So. 823 (1924); Wilkinson Cty. v. Foster Creek Lumber and Mfg. Co., 135 Miss. 616, 100 So. 2 (1924).

At this time it may be well to point out the exact relation between the state tax commission and the board of supervisors. It is well set out in the case of *Taylor v. State*,²⁷ in which case the court stated:

"The board of supervisors is the equalizer of the assessments of the individuals. The state tax commission is the equalizer of the assessments among the different counties.

"The powers to equalize the assessments given both the board of supervisors and the state board are purely statutory. No constitutional privilege to equalize assessments is conferred upon the board of supervisors by the Constitution; neither is any such power conferred upon the state tax commission. It therefore rests entirely with the legislature to bestow so much or so little of this power as it may see fit upon either board."

The legislature, in distributing this power between the state tax commission and the board of supervisors, has made the decision of the tax commission, in regard to the value of certain classes of property, final. There is no discretion vested in the board of supervisors in making this increase or decrease ordered by the commission. The board must accept the finding of the tax commission, whether it thinks it too much, or too little. The board has no discretion whatever in raising the requisite amount of revenue on the class of property named in the order of the tax commission. Its only discretion is to again go into the question of equalizing the relative value of this class of property among the individual taxpayers. When this equalization has been made and the amount called for by the order of the tax commission has not been raised then the balance of this amount must be raised by the board of supervisors by applying equitably what would then necessarily be a horizontal raise to this class of property.²⁸

Up until 1927,²⁹ the problem of when the ten days for appeal began to run was fairly clear. If the tax commission ordered a change, then the assessment was not complete until that change had been made and spread upon the minutes of the board of supervisors and approved by the board. The approval of the roll after such correction by the board was necessary to show conformity to the order of the tax commission. But, where the tax commission approved without any change, its order was the last step in the proceeding, and when its approval was spread upon the minutes of the board of supervisors, the assessment was complete, and the taxpayer could appeal therefrom to the circuit court.³⁰

²⁷121 Miss. 771, 797, 83 So. 810, 813 (1920).

²⁸*Taylor v. State*, 121 Miss. 771, 83 So. 810 (1920).

²⁹This was until the decision in *Edward Hines Yellow Pine Trustees v. State*, 146 Miss. 101, 112 So. 12 (1927).

³⁰In the first case decided by the Supreme Court on the question of when the appeal must be brought, after the enactment of the statute providing for the procedure as Chapter 125, Laws of 1918, the question involved was whether the action of the board of supervisors equalizing the assessment was final, or whether the taxpayer must await the action of the tax commission. The court in *Mobile & Ohio R. R. v. Board of Supervisors of Wayne Cty.*, 124 Miss. 655, 87 So. 138 (1920) stated: "It seems to us that the statutory scheme makes the state tax commission the final arbiter, and the taxpayer must await the final judgment of the commission. Then, and not

Such was the law when the case of *Edward Hines Trustees v. State*³¹ came up for hearing. In this case the recapitulation of the assessment roll, as equalized by the board of supervisors at its August meeting, was transmitted to and approved by the state tax commission. An order of the commission approving this recapitulation was transmitted to, and was entered on the minutes of the board of supervisors at its October meeting. A copy of the roll was then transmitted by the clerk of the board to the state

until then, may the taxpayer appeal to the court. The state tax commission may raise or lower the assessment made by the assessor and approved by the board of supervisors, or, as in this instance, the commission may approve the action of the county board of supervisors." Here the appeal was from the September term of the board and the court held that it was brought within the proper time.

In the case of *Moller-Vondenboom Lumber Co., v. Board of Supervisors of Attalla Cty.*, 135 Miss. 249, 99 So. 823 (1924), this same question was presented and the court reached the same result. In this case the taxpayer contended that he had the right to appeal under section 81, Code of 1906 (section 62, Code of 1930) from the order of the board of supervisors made at its equalization meeting held in August, although such order since the adoption of the State Tax Commission Act was only an interlocutory order. He also claimed that he had the right of appeal from the final order of the board under section 10 of the Tax Commission Act (section 3179, Code of 1930).

In answer to this contention the court stated that an appeal would not lie under section 81 of the code until the judgment of the board approving the assessment had become final, and that such an order was not final until the assessment roll had been approved and the board had adjourned. The court then stated: "Certainly great confusion would result if two appeals were intended to be given the taxpayer, one from the interlocutory order entered at the August equalization meeting of the board and the other after the receipt of instructions from the state tax commission. On the other hand, to hold that there is no right of appeal in the taxpayer until after the action of the board of supervisors in carrying out the instructions of the state tax commission would protect both the interest of the public and the taxpayer and do no violence to any provision of the statutes involved. It seems that there can be little question that no action taken by the board of supervisors prior to such instructions from the state tax commission is final.

"We hold that only the final order of the board of supervisors can be appealed from, and that the grant of the right of appeal and the manner in which it is to be prosecuted are regulated and controlled by section 81, Code of 1906 [section 62, Code of 1930] and section 10 of chapter 323, Laws of 1920 [section 3179, Code of 1930] construed together. From the tax commission act it is apparent that no final adverse decision to the taxpayer can be made by the board until its meeting at which the instructions of the state tax commission for horizontal increases or decreases are entered by the board of supervisors. And, furthermore, if the state tax commission order no horizontal increases or decreases of property, still any action of the board of supervisors taken theretofore with reference to equalization of assessments is not final."

In *Moller-Vondenboom Lumber Co. v. Board of Supervisors of Attalla Cty.*, 138 Miss. 289, 103 So. 81 (1924), it was held that when the final order approving the raise ordered by the tax commission was entered on the minutes of the board of supervisors it became the final judgment of the board and an appeal could be prosecuted therefrom.

In *Marathon Lumber Co. v. State*, 139 Miss. 125, 103 So. 798 (1925), a still further distinction was made, although it was entirely consistent with the foregoing cases. In this case it was held that where the tax commission makes no change whatever, but approves the roll as made up, and this order is spread upon the minutes of the board of supervisors, it is a final approval of the roll as far as the tax commission and the board of supervisors are concerned, and it is not necessary for the board of supervisors thereafter in such case to make a separate order re-approving the assessment roll itself.

³¹146 Miss. 101, 112 So. 12 (1927).

tax commission which then approved the roll by a written order which it transmitted to the board of supervisors, and which that board entered on its minutes at its November meeting. The attorney general appealed within twenty days after the adjournment of the November meeting.³² It was contended that it was too late to take the appeal; that it had to be within twenty days after the October meeting.

The majority of the court held that the appeal was within the proper time. In the majority opinion, Judge Smith stated that although the preceding cases on this question were brought under section 3179, Code of 1930, and this action was brought under section 62, Code of 1930, and the wording of the statutes was not identical, still their meaning, insofar as the question involved in this case was concerned, was identical.

He then attempted to avoid the decisions of the prior cases on this question and finally held that the appeal was taken within twenty days after the adjournment of the meeting at which the approval of the roll by the state tax commission was entered on the minutes of the board of supervisors, and consequently came within the express language of the statute. He did not deny, by any means, the right to appeal from the October meeting. In fact, he seemed to intimate that such an appeal would have been entirely proper. Thus he seems to be allowing the right to appeal from two different "final" assessments.

Judge Ethridge wrote a strong dissenting opinion in which he disagreed with that part of the opinion that held that the tax commission could make further changes in the assessment roll, when the roll was made up and sent to it for its final approval, after its orders to the board of supervisors had been entered in accordance with the directions of the tax commission. He contended that the assessment became final at the October meeting and the appeal would have to have been brought within twenty days from that meeting.

Judge Holden dissented on the ground that it was in conflict with the case of *Marathon Lumber Co. v. State*,³³ and that unless it overruled this prior case, then the prior case must control this question.

Then in *Tatum v. Smith*,³⁴ Judge Smith again speaking, the court reaffirmed the decision in *Edward Hines Trustees v. State*,³⁵ this time a taxpayer being the party appealing. But in *Warren County v. Mississippi River Ferry Co.*,³⁶ where the question of whether the approval of the board of supervisors at the equalization meeting in August constituted a final assessment was involved, the court cited not only the case of *Edward Hines Trustees v. State*,³⁷ but also the preceding cases as well; thus indicating that they still presented the law on the question. This decision was written by Judge Etheridge.

³²The attorney general is given twenty days after the adjournment of the meeting at which the assessment becomes final in which to appeal. MISS. CODE ANN. (1930) § 62.

³³139 Miss. 125, 103 So. 798 (1925).

³⁴158 Miss. 511, 130 So. 683 (1930).

³⁵146 Miss. 101, 112 So. 12 (1927).

³⁶170 Miss. 183, 154 So. 349 (1934).

³⁷146 Miss. 101, 112 So. 12 (1927).

Therefore, it can be seen that the taxpayer, to be sure to appeal at the proper time should appeal from the October meeting and then to be absolutely certain should also file his appeal after the November meeting. This is a situation which should be corrected and a definite time set in which the taxpayer is to appeal.^{37a}

Once the appeal has been made section 62, Code of 1930 provides that "the controversy shall be tried anew in the circuit court at the first term, and be a preference case." The problem now arises as to what is meant by "tried anew."

The general holding as to what these words mean is clearly set out in the case of *Whittle v. City of Hattiesburg*,³⁸ in which the court stated:

"To try a case anew means to try it as if it had never been tried before. It means that the judgment appealed from is wiped out and the cause stands in the circuit court for trial exactly like it did before the equalization board. The judgment appealed from stands exactly like a judgment of a justice of the peace court in a cause appealed to the circuit court. In such a case the judgment of the justice of the peace court is ignored as evidence in the cause for the reason that the statute authorizing appeals from such judgments provides, as does this one, for a trial de novo."

Thus it is held that on a trial in the circuit court the assessor's return must be treated as prima facie correct and not the order of the equalization board, and that therefore the burden of proof was on the state is trying to overturn the action of the assessor.

In interpreting this case it was held in *Town of Union v. Buckwalter Lumber Co.*³⁹ that on appeal to the circuit court from an order of the mayor and board of aldermen of a municipality increasing an assessment of property for taxes, it was error to grant a general peremptory instruction in favor of the taxpayer, where there was testimony on behalf of the municipality which would warrant a finding that some, if not all, of the items of property had been under-valued in the assessor's return.

Although it is true that these cases were concerned with municipalities, still it seems only logical that the same reasoning would be applied to appeals from the board of supervisors, since both appeals would be brought under the same statute and with the same procedure.⁴⁰

^{37a}After this paper was sent to the printers the case of *Evans v. Board of Supervisors of Calhoun Cty.*, 5 So.(2d) 224 (Miss. 1941) was decided. The opinion in this case says that an appeal may be taken within ten days from the adjournment of either the October or the November meeting of the Board of Supervisors. The court makes no attempt to decide the vexed question of when the assessment becomes final but merely declares that: "Neither the taxpayer nor the sovereign should be put to the gamble of seizing at just the right moment the shuttlecock as it moves back and forth between the supervisors and the Commission in an effort to weave the tax fabric of the State." 5 So. (2d.) at 226. This decision is hard to reconcile with some of the earlier cases and does not eliminate the need for legislative action to clarify the situation.

³⁸132 Miss. 808, 96 So. 741 (1923).

³⁹136 Miss. 414, 101 So. 561 (1924).

⁴⁰Although the appeal from the board of supervisors may be brought under section 3179, Code of 1930, the procedure for the appeal is set out in section 62, Code of 1930, and, as has been shown, both of these statutes are identical in regard to this question.

The power of the circuit court when the case has been appealed to it is practically unlimited. The case being tried *de novo*, the circuit court proceeds as though there had been no action by the board. It is not bound by what the board did, but can itself do on appeal what the board should have done when the cause was before the board. In the case of *Knox v. Dantzler Lumber Co.*,⁴¹ the court stated:

"The appeal suspends the judgment of the board of supervisors, and the cause is to be tried in the circuit court just as though the court was itself the board of supervisors. That being true, and the board of supervisors having jurisdiction to add property to the roll, or assess persons thereon who have not been placed on the roll by the assessor, on appeal the circuit court may add such property to the assessment, or direct it to be done by the assessor as the board does."

When an appeal from an assessment is prosecuted by the attorney general, and the question is the overvaluation or undervaluation of the property under the assessment, then the entire assessment is thrown open. The taxpayer may then show that the property in question is overvalued, or he may show that some of his property in the appeal is of less value than assessed, and that such overvaluation equals all undervaluation of other property assessed, thus precluding a raise in the whole assessment appealed from.⁴²

If the taxpayer wishes to appeal from the decision of the circuit court to the Supreme Court, he may do so under the proper circumstances. However, if he does so, he should be sure that the record of the board contains the order of the board of supervisors and the tax commission, showing the approval of the assessment roll. If the record sent up to the Supreme Court does not contain this order, it does not show that there was a judgment of the board finally approving the roll. Since this judgment is jurisdictional, an appeal will not lie.⁴³

When an assessment is appealed to the Supreme Court, and there is only a partial reduction, then the question is presented of who will bear the cost of the appeal together with the statutory penalty.⁴⁴ The test laid down by the Supreme Court to determine this question is that the statute is to receive a reasonable construction, in view of its manifest purpose. The court will determine who is the successful litigant, to all practical intents, and assess the cost and penalty accordingly.⁴⁵

⁴¹148 Miss. 834, 855, 114 So. 873, 877 (1928).

⁴²*Robinson Land and Lumber Co. v. Roberson*, 126 Miss. 535, 89 So. 160 (1921).

⁴³*Board of Supervisors of Greene Cty. v. Kittrell*, 150 Miss. 329, 116 So. 431 (1928).

⁴⁴MISS. CODE ANN. (1930) § 1789, provides that if the taxes are not paid within thirty days after the legal assessment has been approved, that the taxpayer will be subjected to a ten per cent penalty payable to the collector, such taxes being delinquent.

⁴⁵*Atkinson & Bacot Co. v. Board of Supervisors of Pike Cty.*, 73 Miss. 348, 18 So. 924 (1895).

Recovery of Taxes Paid

If a taxpayer meets all of the requirements for prosecuting an appeal of his assessment, then he is faced with the question of whether or not to go ahead and pay his taxes based on this alleged erroneous assessment.⁴⁶ Section 3180, Code of 1930, provides that the appeal shall not delay the collection of taxes due by the assessment as approved, and section 1789, provides that if the taxes are not paid within thirty days after the legal assessment has been approved that the taxpayer will be subjected to a ten per cent penalty payable to the collector, such taxes being delinquent. Thus the taxpayer is presented with the problem of whether to pay the taxes under protest, or whether to go ahead and pay them with no protest. If he pays them under coercion, apparently no protest is necessary.⁴⁷

The question then presented is whether the taxes must be paid under protest before the taxpayer can recover them. At common law, where a direct action was brought by the taxpayer to recover taxes erroneously paid, it was necessary, before the taxes could be recovered, that they be paid either under protest or under coercion. The general holding was that where a proceeding was void on its face and could not be upheld at all, a protest in general terms was sufficient. But, if the defect arose from failure to observe some requirement, or from some fact not appearing upon the face of the record, then the protest ought to be special and call attention to the defect.⁴⁸

What constituted coercion was set out in the case of *City of Vicksburg v. Butler*,⁴⁹ where it was said:

"If the parties are upon an equality, neither party having the advantage of the other, a payment is voluntary unless there is

⁴⁶In *Tunica Cty. v. Simpson Tate*, 78 Miss. 294, 29 So. 74 (1900) it was held that after the execution of an appeal bond, as required by statute, an appeal by a taxpayer to the circuit court from the judgment of the board of supervisors approving an additional assessment made by the tax collector, was not subject to dismissal for failure to pay or tender the taxes.

Then in *Grenada Bank v. Town of Moorhead*, 160 Miss. 163, 133 So. 666 (1931) it was held that questions involved on taxpayer's appeal to the circuit court from a municipal assessment of taxes did not become moot, notwithstanding the fact that the taxpayer paid the taxes under protest while the appeal was pending. This payment did not preclude him from prosecuting the appeal from the erroneous assessment.

In *Tatum v. Smith*, 158 Miss. 511, 130 So. 683 (1930), where the board increased the assessment of the taxpayer, it was held that even assuming that this subsequent assessment was void, still the taxpayer was entitled to disregard this subsequent order only, thereby leaving the original assessment in force. Therefore he should tender payment of this original assessment.

⁴⁷If the taxpayer does wait to pay the taxes until he is forced to pay them and by so doing makes himself liable for the ten per cent penalty, then if the appeal is decided in his favor in whole or in part, to that extent the taxes collected are illegally collected, and he is not only entitled to have returned to him the taxes illegally collected, but in addition, the ten per cent penalty based on such illegally collected taxes. *McKenzie v. Adams-Banks Lumber Co.*, 157 Miss. 482, 128 So. 334 (1930).

⁴⁸*Town of Wesson v. Collins*, 72 Miss. 844, 18 So. 360 (1895); *Pearl River Cty. v. Lacey Lumber Co.*, 124 Miss. 85, 86 So. 755 (1920).

⁴⁹56 Miss. 72, 75 (1878).

some application of force or threats, which makes the act compulsory. . . . But if the party demanding the money is the officer clothed with authority to enforce payment, the parties are not on equal terms, and there need not be application of physical force, or threats which constrain the conduct of the party. . . . If the collector of taxes is clothed with authority under the law, at the time he demands the money from the taxpayer, to enforce payment by the arrest of the person or distress of property, and an illegal tax is paid to avoid the one or the other, and the payer brings to the notice of the collector, in any mode, that the tax is illegal, or that it is objected to for that reason, such payment is clearly a compulsory payment. It is not necessary for the payer to wait until his person has been arrested, or his property seized, before he makes the payment. He may anticipate the extreme course that the officer is compelled by his authority to take, and pay to avoid that alternative."

In 1900 the legislature passed a statute which provided another method of obtaining a refund of these erroneously paid taxes.⁵⁰ Under this statute authority was conferred on the attorney general to approve the refund of such taxes after they had been audited by the public auditor, and this gave the treasurer the authority to make the refund.

Then in 1926 the legislature amended this section so that it no longer required that before a refund was authorized, the payment must have been made under protest, or because of coercive measures taken on the part of the collecting officers.⁵¹

At first glance it would seem that this section did away with the necessity of a protest, but this is not true. The interpretation that has been placed on this statute is that it is not necessary that the tax payment be made under protest to authorize such a refund under the statutory method; that is, refunds made upon, and as a result of, an audit and certificate of the auditor of public accounts, approved by the attorney general; but that this provision of the statute has no application to direct suits against the county for taxes erroneously paid into the county treasury.⁵² Thus the courts are keeping separate and distinct the common law action for the refund against the state or county, and the statutory method *authorizing* the auditor and attorney general to approve the refund.

At this time, under this statutory method, it was necessary for the attorney general to approve any request for a refund, whether from the state treasury or county treasury. However, in 1932, the legislature en-

⁵⁰MISS. CODE ANN. (1906) § 4346.

⁵¹MISS. CODE ANN. (1930) § 3276.

⁵²*Schmittler v. Sunflower Cty.*, 156 Miss. 227, 125 So. 534 (1929).

However, there is a very peculiar holding in *Mississippi Cent. R. R. v. City of Hattiesburg*, 163 Miss. 311, 141 So. 897 (1932). The court, in this case, cited the *Schmittler* case, *supra*, as holding that a protest was necessary to enable the party to recover the taxes erroneously paid, but went ahead to state that section 3276, Code of 1930, authorized the refund of taxes erroneously paid, whether paid under protest or not, but since it created a right and not a mere remedy, its application was prospective and not retrospective. Thus it did not apply to taxes paid before the enactment of the statute, and did not apply to that particular case.

acted a statute that provided that, as regards the county taxes, the board of supervisors has the same power to approve the refund that the attorney general was given under the statute.⁵³ Thus, under these statutes, the attorney general controls the refunds from the state treasury and the board of supervisors controls the county treasury.

It must be remembered in connection with this statutory proceeding that the statutes do not confer judicial power on the auditor and attorney general, but only provide an easy method to secure uniformity of practice based on the judgment of competent officers. Thus, the approval of a claim by these officers does not make mandatory upon the treasurer or the county board to refund if they in good faith believe that there is a good defense to the claim and that they can contest the legality of the claim in a judicial proceeding in the courts.⁵⁴

The question then arises as to whether the court can compel the attorney general or board of supervisors, by a mandamus, to approve such a refund. In *Selig v. Price*,⁵⁵ where a national bank paid taxes on an assessment made against its capital stock, undivided profits, and real estate, voluntarily, it was alleged that the assessments were made in violation of the law, and application was made to the auditor and attorney general under section 3276, Code of 1930, for a refund of the taxes so paid. The attorney general refused to approve the claim and the bank sought to force him to do so by a mandamus. In its decision the court stated:

"It is discretionary with the state authorities where the taxes are not paid under protest to refund them when there are proper equities in favor of the taxpayer, but it is not the duty of the court to attempt to control by mandamus.

"Furthermore, the statute, section 3191, Code of 1930, authorizes changes in the assessment roll where property is erroneously assessed, or parties assessed wrongfully, after it has been approved by the board of supervisors and the tax commission and before the taxes have been paid and under section 420, Code of 1930, the appellant had the right to enjoin the collection of taxes if the assessment against it was void.

"Having failed to avail itself of any of the remedies provided by law to prevent the collection of taxes, and having voluntarily paid such taxes to the proper agencies at a time when the state could have protected its interest in such assessment, we are of the opinion that the appellant lost its right, and that, since the proper authorities, having jurisdiction to determine whether a refund ought to have been made, have determined that it should not be made, the court cannot, by mandamus, afford the relief prayed for."⁵⁶

⁵³MISS. CODE ANN. (Supp. 1938) § 474.

⁵⁴*Town of Wesson v. Collins*, 72 Miss. 844, 18 So. 360 (1895); *Pearl River Cty. v. Lacey Lumber Co.*, 124 Miss. 85, 86 So. 755 (1920); *City of Hattiesburg v. New Orleans & N. E. R. R.*, 141 Miss. 497, 106 So. 749 (1926).

⁵⁵167 Miss. 612, 142 So. 504 (1932).

⁵⁶*Selig v. Price*, 167 Miss. 612, 621, 142 So. 504, 506 (1932).

The exact holding in this case is not clear. Although it holds that the court cannot force the attorney general to approve the return of the taxes, it does go into the facts of the particular case, which are peculiar in that the bank received the money to pay the taxes from its stock holders, and, thus, if it had recovered in this suit, it would have been getting this amount twice. Whether the court would have ordered the return of the taxes if it had determined that the plaintiff was entitled to them from the facts of the particular case is not absolutely clear, but from the implication in the language of the decision it seems that there is a possibility that this may be done under the proper circumstances.

Thus the taxpayer is provided with a statutory method by which he may be able to have the erroneous taxes refunded. However, if the proper authorities—the attorney general or board of supervisors—refuse to approve the requested refund, then in all probability the court will not require them to do so by a mandamus. If this method fails, then the taxpayer may bring a direct action to recover the taxes, provided he paid them under protest.

Injunction Against the Collection of the Tax

It is provided in section 420, Code of 1930, that "The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law." Thus it may be that the taxpayer can apply to the chancery court for an injunction to restrain the collection of the taxes.⁵⁷

Under section 420, the power of the chancery court to restrain the collection of the taxes can be exercised in only two instances: First, when they have been levied without authority of law; and second, when they are attempted to be collected without authority of law.⁵⁸ However, if in the assessment of property and the levy of taxes a taxpayer is wronged by fraud or accident, equity, as a general proposition, as in all judicial proceedings, ought to interfere. In such cases, though, the taxpayer must show that he has exercised strict diligence in availing himself of every opportunity elsewhere afforded by statute for a correction of the alleged errors. The court of equity has no jurisdiction to revise or correct erroneous assessments, or matters of like nature. These questions should be presented to the board of supervisors, or appealed from this board under the proper conditions.⁵⁹

⁵⁷In this connection it is important to remember that the jurisdiction of equity to restrain proceedings at law may be invoked only where there exists some equitable ground, and the remedy of defendant in suit at law is not plain, adequate, and complete. Nor will a bill to enjoin an attorney general from appealing from a tax assessment be maintained if the remedy sought is defensive merely and equally available in a suit at law. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 901 (1926).

⁵⁸*Thompson v. Krutzer*, 103 Miss. 388, 60 So. 334 (1912).

⁵⁹*Brooks v. Shelton*, 47 Miss. 243 (1872); *Anderson v. Ingersoll*, 62 Miss. 73 (1884); *Board of Supervisors of Noxubee Cty. v. Ames*, 3 So. 37 (Miss. 1887); *City of Meridian v. Ragsdale*, 67 Miss. 86 (1889); *Morris Ice Co. v. Adams*, 75 Miss. 410, 22 So. 944 (1897); *Lewis v. Village of Boguichitto*, 76 Miss. 356, 24 So. 875 (1898).

However, the action of the board of supervisors in matters of assessment is only conclusive as to the mere irregularities and matters of fact resting wholly in pais, and thus is not final as to the claim of exemption under statutory or constitutional provisions.⁶⁰ Since this power to restrain the collection of taxes, in this respect, belongs to the chancery court only because of the code section⁶¹ granting it such power,⁶² the party asking the aid of the chancery court must show affirmatively the exemption expressly declared and that he is clearly within its terms.⁶³ In this regard, it was held in the case of *North American Catholic Diocese v. Havens*,⁶⁴ where the property involved was subject to taxation unless it was being used for religious or charitable purposes, that it was not absolutely exempt from taxation, but was subject to taxation according to the facts as may be proved. Therefore it was held that an injunction was not the proper method. If the property is absolutely not taxable under any conditions, and the taxing authorities should attempt to tax it, then an injunction may be resorted to; but where it is taxable, or not, according to the facts which exist, the owner should appear before the board and present his objections under section 3165.

There may also be circumstances under which the federal courts may be resorted to in order to restrain the collection of the allegedly erroneous assessment. This problem in its application to Mississippi tax procedure has been well explained by the case of *First National Bank of Greenville v. Gildart*,⁶⁵ the court stating:

"We think that the complainant may not maintain these suits for the reason that at the time they were brought the assessment had not become final, but were in the process of settlement in the Mississippi courts in a proceeding which though partly judicial was also essentially administrative in character. Sections 61, 3179 and 3180 of Mississippi Code of 1930 provide as a part of assessment proceedings, a full remedial review in the courts. In those proceedings complainant may present every question which it now seeks to litigate, advance every federal right which it now asserts. When administrative proceedings of this character are provided by the state, it is the duty of persons to avail themselves of them before applying to the federal court for relief. . . . It is only when the proceeding provided in the state court is purely judicial that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a review in the state courts. It will not do to say that since the Mississippi Supreme Court has already determined the question adversely to it, appellant ought not be required to futilely pursue the administrative remedies which the state provides, for the remedy provided here is not confined to resort to the taxing board. It extends to a full review in the courts. Nor will it do for appellant to say that the proceeding

⁶⁰*Horne v. Green*, 52 Miss. 452 (1876).

⁶¹MISS. CODE ANN. (1930) § 420.

⁶²*Purvis v. Robinson*, 110 Miss. 64, 69 So. 673 (1915).

⁶³*Morris Ice Co. v. Adams*, 75 Miss. 410, 22 So. 944 (1897).

⁶⁴164 Miss. 119, 144 So. 473 (1932).

⁶⁵64 F. (2d) 873, 874 (C.C.A. 5th, 1933).

is not adequate because no provision is made to stay the collection of the tax pending appeal, for while the statute does provide that the appeal shall not delay the collection of taxes nothing in it deprives the court of its general equity powers. And further, it makes express provision for refundment of all taxes collected, if the judgment be in favor of the party appealing."⁶⁶

Robert C. Cannada.

⁶⁶*Accord*: *Matthews v. Rodgers*, 284 U. S. 521, 52 Sup. Ct. 217, 76 L. ed. 447 (1932).

However, the federal court in *Interstate Natural Gas Co. v. Gully*, 8 Fed. Supp. 174 (S. D. Miss. 1934) held that special circumstances, such as alleged insolvency of the tax collectors and burden of multiplicity of suits show that the complaining party did not have a plain, adequate, and complete remedy at law. Thus, the federal court took jurisdiction of, and entertained the taxpayer's bill for an injunction against the assessment. This was done even though the assessment was not complete, on the grounds that the assessment was certain to be completed.

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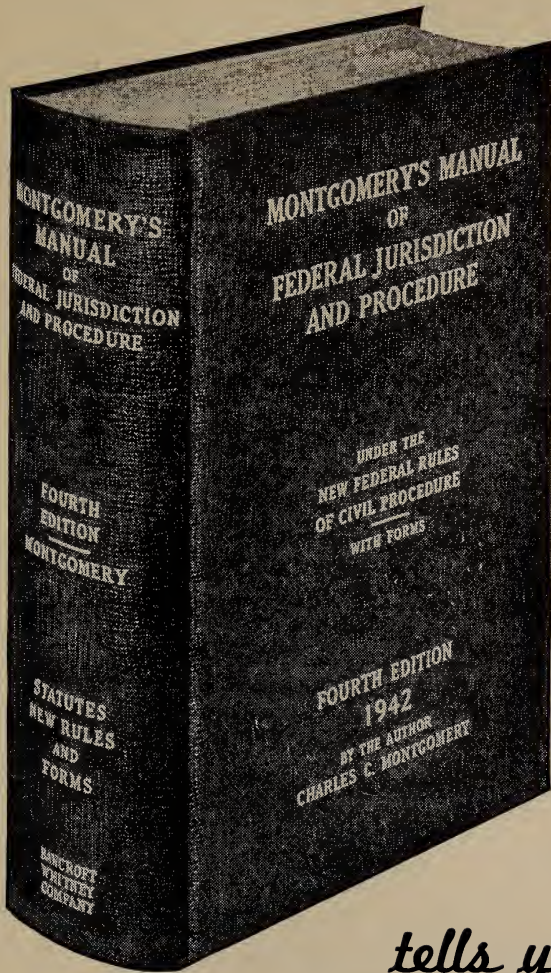
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